# Judicial Independence in India: Tipping the Scale

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International Commission of Jurists

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This report reflects the findings and conclusions of the ICJ, which takes full responsibility for its content.

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## Executive Summary

This report of the International Commission of Jurists (ICJ) looks at the state of judicial independence in India, by examining the constitutional basis, legal framework and jurisprudence governing institutional independence of the Supreme Court and High Courts in India against international law and standards. It focuses particularly on the Supreme Court to assess institutional independence as well as the independence of individual judges and refers to corresponding aspects of the High Courts in a select manner where relevant. The assessment is restricted to the past decade (2014-2024), a period which has witnessed retrogressive developments in respect of judicial independence.

The report considers the process of selection and appointment of judges, transfer of judges between High Courts, removal of judges and judicial accountability. It also looks at certain aspects of judicial administration such as the listing and allocation of cases and post-retirement employment of judges. The ICJ comes to the conclusion that there is a series of structural weaknesses in the Indian judicial system. While nominally, the Indian judiciary is constitutionally insulated from the executive and the legislature, significant scope for external, including executive influence remains. The Indian judiciary has itself failed to provide for appropriate self-governance mechanisms and arrangements that ensure optimal accountability for the fair and independent administration of justice.

**The main findings of the report**

A crucial weakness that consistently emerges is the lack of predetermined and objective criteria and deficit of transparency, whether in matters of selection and appointment or transfer of judges or judicial accountability and concomitantly excessive discretion, exercised by the Chief Justice of the Supreme Court as well as the veto power that the executive exercises in some aspects.

**Appropriate means and criteria for the selection and appointment of judges to the Supreme Court and High Court** are central to judicial independence. The selection of judges is formally and structurally safeguarded against external influence and interference by vesting the power with the judiciary itself, specifically with the Collegium, comprising the Chief Justice and four senior most judges of the Supreme Court. However, as the report highlights, there is a lack of a clear and transparent procedure of selection and of objective and predetermined criteria based on competence, merit, ability, experience and integrity. There is therefore an absence of adequate safeguards against selection for improper means and motive. In practice there has been a high level of friction between the judiciary and executive in India in the exercise of authority in this area.

**Appointment of judges** is done through a prescribed procedure. However, the process gives the government an effective veto power on recommendations made by the collegium, allowing the executive a determinative role in the composition of the higher judiciary.

**The process for transfer of judges** between High Courts is similar to that of selection and appointment of Judges. The judiciary decides and recommends the transfer and the executive carries it out. Consent of the concerned judge is not required to effect a transfer. Transfers proceed on vague criteria, not defined in law, such as 'public interest' and 'better administration of justice' without clear explanation. The report, using a number of case examples, shows how the system allows for an arbitrariness, often making it impossible to distinguish between transfers being used as disguised sanction, transfers intended to be punitive or retaliatory and transfers for the better administration of justice and public interest.

**Removal of judges** from office is contemplated under the Constitution, but the power to initiate removal or impeachment proceedings is vested with Parliament, which is inconsistent with international law principles that require the power of removal to be vested with an independent body composed of a majority of judges and not with either the legislature or executive.

**Judicial accountability** is achieved either through impeachment by Parliament or through an in-house administrative procedure headed by the Chief Justice. Other than impeachment, judicial accountability mechanisms in India are insular and ineffective, making real accountability near impossible. The 'In-House Procedure' developed by the Supreme Court to inquire into complaints against judges is not statutorily backed. It is not based on any articulated rules or norms of judicial conduct that serve as a substantive basis to determine misconduct. The procedure to initiate inquiry and conduct the inquiry is indeterminate and vests excessive discretionary power with the Chief Justice of the Supreme Court.

In addition to these structural factors that have the potential of undermining both internal and external

independence of the judiciary, common practices in relation to post-retirement employment of judges and allocation of cases have posed serious risks to judicial independence in India, particularly in the past decade.

**Post retirement employment of judges** is an unregulated field. The practice of post-retirement employment of judges, particularly when the appointment is carried out at the discretion of the government casts a shadow of bias on the concerned judge while at the same time allowing for indirect executive influence over the judge while in office.

**Judicial administration** including the allocation of benches falls within the sole purview of the Supreme Court and High Court as a means of insulating the judiciary from the executive. Internal administration pertaining to listing and allocation of cases in the Supreme Court, while based on predetermined rules and procedures, are also subject to the discretionary power of the Chief Justice of India. Instances of irregular listing and allocation, presumably at the discretion of the Chief Justice, have given rise to seemingly arbitrary exercise of power by the Chief Justice, at times in a manner that suits the government.

The ICJ, while affirming that the Indian system has the foundations for judicial independence, urges the Government of India, as well as the Supreme Court, to urgently take steps to ensure the independence of the Indian judiciary in line with international law and standards. This is in furtherance of the objective of ensuring the judiciary's role in promoting the rule of law and protecting human rights and in accordance with India's international legal obligations.

The ICJ makes the following recommendations:

1. **Selection and Appointment of Judges and Transfer of Judges:**

    a. The Government of India [and Parliament], pursuant to the advice, guidance and approval of the Supreme Court of India, should enact a statute providing for and setting the procedural and substantive terms for the establishment and constitution of a Judicial Council. The statute should provide that the membership of the Council will be constituted of a majority of judges responsible for selection, career progression and transfer of judges. The procedural and substantive terms should be consistent with international law and standards on the independence of the judiciary, including the UN Basic principles and the Beijing principles. There should be gender parity in its membership, which should also reflect the demographic pluralism of India, including the scheduled castes, scheduled tribes communities and religious minorities.
    b. In formulating the terms of the statute, the Government should establish a consultative process including with representatives of the legal profession, with a view to producing and adopting fixed criteria which meet international law and standards and which would form the sole basis for selection of Judges to the Supreme Court and High Court; the elevation of Judges from the High Court to the Supreme Court; and the transfer of judges between High Courts. These criteria and best practices should be made publicly available.
    c. Pending the enactment of a statute constituting a judicial council for selection of judges, the Government of India, pursuant to the advice, guidance and with the approval of the Supreme Court of India, and following a consultative process including with representatives of the legal profession, should formulate and adopt fixed criteria which meet international law and standards and which would form the sole basis for selection of Judges to the Supreme Court and High Court; the elevation of Judges from the High Court to the Supreme Court; and the transfer of judges between High Courts. These criteria and best practices should be made publicly available.

2. **Judicial Accountability:**

    a. The Supreme Court of India should, following broad consultations with representatives of the legal profession, formulate and adopt binding codes of judicial conduct in adherence with international law and standards.

b. The Indian Parliament, following the advice and agreement of the Supreme Court of India and after broad consultations with representatives of the legal profession should establish a statutory mechanism for the redress of complaints against Judges of the High Courts and the Supreme Court based on international law and standards on judicial accountability. While ensuring that the executive and legislature have no role in the adjudication of such complaints, the redress mechanism and its outcomes must be amenable to judicial review.

**3. Post-retirement Employment:**

The Supreme Court of India should, following broad consultations with the legal profession, consider formulating rules for the post-retirement employment or posting of Judges aimed at safeguarding against corruption or practices inconsistent with judicial independence, and to prevent the practice of employment or postings being determined solely by executive discretion.

**4. Judicial administration pertaining to listing and allocation of cases:**

The Supreme Court of India should bring existing rules, policies and practices in line with international standards and best practices, particularly focusing on removing discretion and scope for arbitrariness in the listing and allocation of case.

## Introduction

The Indian judiciary is constitutionally insulated from the executive and the legislature. However, significant scope for external, including executive influence remain due to institutional weaknesses and common practices which undermine internal as well as external independence of the Indian judiciary, ultimately posing a risk to judicial accountability and justice delivery.

The independence of the judiciary, as well as its accountability, is a universal rule of law principle.[1] Under international law and standards, all States must guarantee the independence of the judiciary, including by ensuring that it is prescribed by law, and upheld in practice by all State authorities.[2] The judicial system is central to human rights protection in any national context.[3]

The ICJ in this Report examines select aspects of the structure and functioning of the Indian Judiciary which serve to undermine judicial independence and adversely impact the rule of law and protection of human rights. The report is divided into five parts, each of which focuses on a specific criterion for objectively determining judicial independence: The first part (A) surveys the Indian legal system as it pertains to judicial independence; the second part (B) examines the process of selection and appointment of judges; the third part (C) looks at the process for the transfer of judges; while the fourth part (D) examines the law and processes related to judicial accountability, including with respect to the removal of judges; the fifth part (E) considers questions surrounding the post-retirement employment of judges in so far as it affects judicial independence; and the final part (F) treats the question of judicial administration pertaining to the listing and allocation of cases.

### Historical context

India gained independence from British colonial rule in 1947[4] and soon thereafter established a constitutional order incorporating core rule of law principles. A representative constituent assembly drafted a Constitution which was adopted by India in 1950.[5] The Preamble of the Constitution of India envisions it as a "Sovereign, Socialist, Secular, Democratic, Republic" which "secures to all its citizens" "Justice, Liberty, Equality and Fraternity".[6] Part three of the Constitutional guarantees "fundamental rights" or basic human rights, including the right to life and liberty, right to equality, freedom of speech and expression and so on. Judicial independence is guaranteed through constitutional provisions governing the structure, composition and functioning of the judiciary. It also guaranteed the separation of powers among the legislature, executive and the judiciary. Judicial independence and separation of powers form the 'Basic Structure' of the Constitution and are protected from being amended or altered by parliament[7]. The normative framework on judicial independence and human rights is further developed and clarified by a statutory framework through jurisprudence of the Indian Supreme Court.[8]

In India, institutional independence of the judiciary has been moulded through overlapping, and sometimes opposing forces- of ensuring judicial supremacy in selection and in judicial administration, while at the same time vesting the power of appointment of judges with the executive, and the power of removal with the legislature. Executive power of the Union is formally vested in the President, as head of state. The President

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[1] ICJ Tunis Declaration on Reinforcing the Rule of Law and Human Rights (March 2019), para. 11; Human Rights Council. Human rights, democracy and the rule of law, Resolution 19/36 (19 April 2012) A/HRC/RES/19/36, para. 1.

[2] International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 14; UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principle 1.

[3] ICJ. 2007. Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. Geneva, p. 3; ICJ. 2011. Legal Commentary to the Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis. Geneva, chapters 1 and 12.

[4] Indian Independence Act, 1947, United Kingdom.

[5] Constitution of India, Preamble.

[6] Ibid.

[7] The 'Basic Structure' doctrine was laid down by the Supreme Court in its 1973 judgment in *Kesavananda Bharati vs State of Kerala*. It constitutes certain principles and norms that form the basis of the Constitution of India, which cannot be amended, modified or restricted in any manner, neither by the Supreme Court nor by the Parliament. Supreme Court, *Kesavananda Bharati v. State of Kerala*, Writ Petition (Civil) No.135 of 1970, judgment of 24 April 1973.

[8] First Judges Case: Supreme Court of India, *S.P. Gupta v. President Of India And Ors*. AIR 1982 SC 149, judgment of 30 December 1981; Second Judges case: Supreme Court of India, *Supreme Court Advocates-On-Record ... v. Union Of India*. AIR 1994 SC 268 judgment of 6 October 1993; Third Judges case: Supreme Court of India. *In Re: Under Article 143(1) Of The ... v. Unknown*. AIR 1999 SC 1 judgment of 28 October 1998; NJAC judgment: *Supreme Court Advocates-On-Record ... vs Union Of India*. 2016 (5) SCC 1, judgment of 16 October 2015.

in turn acts on the aid and advice of the Council of Ministers, headed by the Prime Minister, who is the head of government. Thus, the executive, through the President, has a role in the selection, appointment and transfer of judges. The parliament has the power to impeach judges of the Supreme Court and High Courts.

Tracing the history of judicial appointments from the 1950's onwards shows that judicial independence in India is characterised by the Indian Supreme Court's efforts to ward off executive interference in its functioning and efforts by parliament to undermine judicial independence, particularly with regard to judicial appointments. The executive and legislature on the other hand continue to assert their powers. The tussle between the three branches of government has shaped debates on judicial independence in India. The first prime minister of independent India, Jawaharlal Nehru, stated as early as in 1949 that the judiciary should never stand in the way of the will of parliament.[9] After independence, from the 1950's to the 1970's the Supreme Court retained complete control over judicial appointments and judicial administration. In the 1970's, including during a 21-month state of emergency (1975-77), the judiciary was subjected to several instances of executive interference, particularly with regard to the appointment and transfer of judges. In response, the Supreme Court took steps to entrench judicial independence within the constitutional framework.[10] The 1980s also saw the judiciary playing a proactive role as a guarantor of human rights[11], which has been subject to criticism by legal scholars on grounds of breach of separations of powers, with the judiciary effectively acting as a "super-legislature" or a "super-executive".[12] More recently the sentiments of Jawaharlal Nehru have been echoed by the Union Law Minister Kiren Rijiju in 2022[13] and by the Vice President of India, Jagdeep Dhankar in 2023,[14] alleging that the judiciary's striking down of laws amounted to an interference with the powers of parliament.

These concerns from the executive, while similar in content, are separated in time by seven decades but also distinguishable by the political and social context in which they have been made. Over the past decade India has been experiencing increasingly authoritarian tendencies by the executive accompanied by widespread failures to protect the rights of minorities, which has necessitated a re-examination of the judicial independence in the country.

**Trends in recent decades**

Since the 1980's India has seen a steady rise of Hindu nationalism with the Hindu nationalist Bharatiya Janata Party (BJP)[15] securing parliamentary majorities in 2014 and again in 2019, allowing them to enact legislation without effective opposition in parliament. Since 2014, there has been a steep increase in attacks against religious minorities, exacerbated by an environment where the government has played a key role fomenting religious polarisation and in criminalising and undermining opposition political parties, peaceful protests, civil society and human rights defenders.[16] In 2024 the BJP returned to power but with a decreased number of parliamentary seats, resulting in them heading a coalition government that is supported by regional parties.[17]

Historically, India's record of human rights violations includes widespread instance of extra-judicial killings, some involving detainees in custody; torture and cruel, inhuman or degrading treatment; and enforced disappearances, including in Kashmir and the North-Eastern States. These violations, potentially amounting to crimes under international law, have typically gone unaddressed and with impunity. Special laws have been enacted that are non-compliant with the right to a fair trial, State authorities have also failed to protect

[9] Jawaharlal Nehru, the first Prime Minister of India, during the Constituent Assembly Debates, *"No Supreme Court and no judiciary can stand in judgement over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way."* Constituent Assembly of India, *Constituent Assembly Draft Making Debates*, 10 September 1949.
[10] Arghya Sengupta, *Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence*, Oxford University Press, India, 2018.
[11] Anuj Bhuwania, *Courting the People: Public interest Litigation in post-emergency India,* Cambridge University Press, India, 2017.
[12] Ibid.
[13] Awstika Das, "Kiren Rijiju: Law Minister Who Crossed the Line Too Far With Rhetoric Against Judiciary", *LiveLaw.in*, 19 May 2023.
[14] Political Bureau, "Vice President Jagdeep Dhankar Slams SC Decision on NJC, says Parl Supreme", *The Economic Times*, 7 December 2022.
Sreeparna Chakrabarty, "Vice-President Jagdeep Dhankar Says Court Can't Dilute Parliament's Sovereignty", *The Hindu*, 11 January 2023.
[15] Bharatiya Janata Party. No date. *Home*.
[16] Deeptiman Tiwary, "Since 2014, 25 Opposition Leaders Facing Corruption Probe Crossed over to BJP, 23 of Them Got Reprieve", *The Indian Express*, 4 April 2024; International Commission of Jurists, Punished for Protest: Violations Against Human Rights Defenders in Times of Covid-19 (2022).
[17] Flora Drury, "Allies back Modi for third term after election setback" *BBC*, 5 June 2024.

the human rights of persons from the Dalit community, religious minorities and women.[18]

**The international legal basis for India's obligation to ensure judicial independence**

The role of the judiciary is paramount in safeguarding human rights and rule of law at all times. The judiciary serves as an essential check on the other branches of the State and ensures that any laws and practices comply with the rule of law and human rights.[19]

The International Covenant on Civil and Political Rights (ICCPR), to which India is a party, provides under article 14 that *"everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*[20]

The UN Human Rights Committee, the supervisory body that provides the authoritative interpretation of the ICCPR, has issued a General Comment clarifying the scope and nature of obligations under article 14 of the ICCPR. There the Committee highlights key aspects of judicial independence and impartiality that are particularly important in considering the Indian context:

"*The requirement of competence, independence and impartiality of a tribunal …is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."*[21]

The overarching universal standards on the independence of the judiciary are contained in the UN Basic Principles on the Independent of the Judiciary, endorsed by the UN General Assembly.[22] The Basic Principles reinforce the general rule of law principle that the judiciary must be structurally and institutionally independent. As affirmed by the Basic Principles, *"[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."*[23]

Under international law and standards, the judiciary must be independent as well as impartial. Judicial independence and impartiality are essential for the fair and equal administration of justice under the rule of law and the protection of human rights.[24] Judicial independence entails institutional independence and the independence of each individual judge both of which must be secured through law. In accordance with the Human Rights Committee's prescription and the UN Basic Principles, institutional and individual independence must be ensured through controls and procedures for the appointment, removal, conditions of tenure, disciplinary action and accountability.[25] States must also respect and ensure the human rights of judges, including their rights of freedom of association and expression.[26]

Judicial independence should be implemented through certain special measures concerning the treatment of

[18] Human Rights Watch, *"India: Events of 2023"* 2024.
[19] International Commission of Jurists, Geneva Declaration: ICJ Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 2008.
[20] International Covenant on Civil and Political Rights UN Doc. 999 UNTS 171, (1976) (ICCPR), article 14.
[21] United Nations Human Rights Committee, General Comment 32 on the right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (Aug. 23, 2007), Para 19.
[22] United Nations, Basic Principles on the Independence of the Judiciary. UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, (1985).
[23] *Ibid,* Principle 1.
[24] *Supra 19.*
[25] *Supra 22,* Principles 11–20.
[26] *Supra 22,* Principles 8 and 9.

judges. Such measures must not be aimed at establishing privileges or personal benefits for judges, but instead should be directed toward providing necessary guarantees for their independence and impartiality. Measures and mechanisms that guarantee independence must be accompanied by mechanisms for accountability in relation to judicial misconduct, including judicial corruption or complicity in human rights violations.[27]

Judicial impartiality is reflected through decisions of the judiciary, which must be made "*on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*"[28]

[27] International Commission of Jurists. Judicial Accountability: ICJ Practitioners' Guide no. 13 (2016).
[28] *Supra 22,* Principle 2.

## Part A: The Indian Legal System and Judicial Independence

*Legal System under the Constitution of India*

India's legal system is based on the English common law tradition. A significant portion of its legal system and court structure derives from the colonial Government of India Act, 1935. India's judicial organization has been described as unitary or a single judicial structure, alongside a political system that is federal. While the governance power comprises the Union or Central government, twenty-eight state governments and eight Union Territories, both Union and State laws are administered under a single court system.[29]

The Constitution of India provides that *"the law declared by the Supreme Court shall be binding on all courts within the territory of India"*.[30] The Constitution codifies the relationship between the Union (Central government) and the States and provides for the administration of each. The Constitution guarantees "fundamental rights" (in articles 12 to 35) and generally prohibits the parliament and the executive from enacting any law or taking any action respectively which takes away or abridges the rights conferred by the fundamental rights chapter.[31] It vests the Supreme Court and High Courts of each State with the power of judicial review and the power to issue directions for the enforcement of fundamental rights.[32] The Constitution also clearly delineates the role, powers and framework within which the executive, legislature and judiciary shall function.

The Indian judiciary comprises the Supreme Court at the Union or the Centre, High Courts at each state and district courts at each district within states. The structure, organisation and powers of the Supreme Court of India are set out in articles 124 to 147 of the Constitution, and of the High Courts and District Courts in articles 214 to 238 of the Constitution. The Supreme Court is the highest court of the Country, having 'Original Jurisdiction' over disputes between state governments on questions of law, and the enforcement of fundamental rights amongst other matters.[33] It also has 'Appellate Jurisdiction' over appeals against judgments or orders delivered by High Courts.[34]

The Supreme Court and the High Courts are also known as 'Constitutional Courts' and 'Courts of Record', as they adjudicate matters of public importance, involving significant questions of law and the interpretation of the Constitution. They also have the power to issue directions and orders or writs for the enforcement of fundamental rights conferred by the Constitution.[35] The extensive jurisdiction of Supreme Court's has earned it the reputation of being the most powerful court in the world,[36]

[29] CONSTITUTION, Part V, Chapter I to IV.
[30] CONSTITUTION, ARTICLE 141.
[31] CONSTITUTION, ARTICLE 13
[32] CONSTITUTION, ARTICLES 32 and 226.
[33] CONSTITUTION, Art. 131. and Supreme Court of India, 'Jurisdiction', Website of Supreme Court of India, no date.
[34] CONSTITUTION, Art. 132. and *Ibid.*
[35] CONSTITUTION, Arts. 32 and 226.
[36] George H. Gadbois, Jr. *Supreme Court of India The Beginnings. Oxford University Press*, New Delhi, 2017.

## Part B: Selection and Appointment of Judges

### I. Applicable International Law and Standards

Central to the issue of judicial independence is the selection and appointment of judges. International law requires that judges be appointed through procedures which are fair, appropriate and which contain structural safeguards against undue interference by the political branches and other powerful actors, such large business enterprises or other influential private institutions.

The ICCPR, to which India is a party, provides in article 14 that *"everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*[37]
The UN Human Rights Committee, the supervisory body providing the authoritative interpretation of the ICCPR, has set out in its General Comment No.32 on the scope and nature of article the key aspects of judicial independence and impartiality. These are necessarily applicable to the Indian context:

> "*The requirement of competence, independence and impartiality of a tribunal…., is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."*[38]

The criteria for selection and appointment of judges, in a manner that preserves independence has been elaborated on by the UN Basic Principles, which provide that, *"judges should be appointed through an open process on the basis of prescribed criteria based on merit and integrity, and without discrimination."*[39] Further, the criteria should ensure the selection of "*individuals of integrity and ability with appropriate training of qualifications in law,"*[40] Selection of judges for promotion too, should follow prescribed criteria, which "*should be based on objective factors, in particular ability, integrity and experience."*[41] Judicial appointment procedures must be clearly set out in domestic law[42] and "*[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives*."[43]

In 1997, the Chief Justices of 32 countries in the Asia Pacific Region, including India, formulated and adopted the Beijing Statement of Principles of the Independence of the Judiciary. These principles emphasise safeguards against improper influence and the requirement of transparency and objectivity in judicial appointments. Principle 12 of the Beijing Statement provides that: *"The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed*.[44] Principle 16 affirms that *"the procedures for appointment of judges should be clearly defined and formalized and information about them should be available to the public."*[45]

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[37] *Supra 20*, article 14.
[38] *Supra 21,* Para 19.
[39] *Supra 22,* Principle 10.
[40] Ibid.
[41] *Supra 22,* Principle 13.
[42] Inter-American Court of Human Rights, *Reverón Trujillo v. Venezuela*, Judgment, 30 June 2009.
[43] *Supra 22*, Principle 10.
[44] LAWASIA: The Law Association for Asia and the Pacific, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1997), Principle 12.
[45] Ibid, Principle 16.

With regard to methods of selection and appointment of judges, the Beijing Statement prescribes a Judicial Services Commission, which is also considered a best practice in other regions of the world.[46] According to the Beijing statement, *"[w]here a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.[47]*

The UN Special Rapporteur on independence of judges and lawyers, in his 2018 report to the UN Human Rights Council, has recommended judicial councils as a preferred method of selection and appointment of judges, *"Judicial councils play an essential role in guaranteeing the independence and the autonomy of the judiciary. The underlying rationale for their creation is the need to insulate the judiciary and judicial career processes from external political pressure, mainly from the executive branch. In addition to their primary function of safeguarding judicial independence, a growing number of judicial councils have been entrusted with far-reaching powers to promote the efficiency and quality of justice and rationalize the administration of justice, court management and budgeting."[48]*

Irrespective of the method followed, a key requirement of selection and appointment procedures is insulation and separation from the executive, a principle continuously reiterated by the UN Human Rights Committee and independent experts appointed by the UN Human Rights Council.[49] A secondary requirement is that the authority selecting judges should be plural, representative and be composed mainly (if not solely) of judges and members of the legal profession.[50]
Additionally, selection criteria require safeguards to ensure equal representation and diversity. International law, particularly article 26 of the ICCPR, guarantees in general terms equality and equal protection under the law and prohibits discrimination on any status grounds. It provides that, *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[51]*

Other principal human rights treaties including, the International Covenant on Economic, Social and Cultural Rights;[52] the International Convention on the Elimination of all forms of Racial Discrimination;[53] and the Convention on the Elimination of all forms of Discrimination against Women also protect against non-discrimination in respect of their subject areas.[54] The UN Basic Principles,[55] and the Beijing Statement[56] contain similar proscriptions.

These instruments each contain non-exhaustive list of status grounds on which discrimination is prohibited, with a catch-all "other status" for non-enumerated grounds. Contemporary human rights law recognizes these to include, among others, "race, colour, sexual orientation or gender identity, age, gender, religion, language, political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status." [57]

The Bangkok General Guidance for Judges in applying Gender Perspective in South and Southeast Asia was developed and endorsed by judges, including from India and prescribes: *"Gender equality should be a*

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[46] European Union, Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, CM (2012)40-final, (28th March 2012).
[47] Supra 44, principle 15.
[48] Diego García-Sayán,Special Rapporteur on the Independence of Judges and Lawyers, Report of the Special Rapporteur on the independence of judges and lawyers: Judicial Council's, UN Doc A/HRC/38/38, (2 May 2018), para 84.
[49] Concluding Observations on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations on Tajikistan, CCPR/CO/84/TJK, para. 17; Concluding Observations on Honduras, CCPR/C/HND/CO/1 (2006), para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20.
[50] Leandro Despouy, Special Rapporteur on the Independence of Judges and Lawyers, Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/11/41 (2009), para. 28-29.
*Supra 3*, para 45-48.
[51] *Supra 20,* article 26.
[52] International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) (16 December 1966).
[53] Committee on the Elimination of Racial Discrimination, See, in particular, Committee on the Elimination of Racial Discrimination General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, UN Doc. A/60/18 (2005) para 98-108.
[54] See in particular, CEDAW Committee, General Recommendation No. 25 on Article 4,para 1, (CEDAW/C/GC/25) (2004).
[55] Supra 22, Principle 10.
[56] Supra 44, principle 13.
[57] UN Committee on Economic, Social and Cultural Rights, General Comment No.20: Non-discrimination in economic, social and cultural rights (art.2, para 2 of the International Covenant on Economic, Social and Cultural Rights), (2009); International Commission of Jurists, the Tunis Declaration on Reinforcing the Rule of Law and Human Rights, (2019).

*principle that guides judicial appointments. There must be gender parity on the bench as women judges bring a diversity of perspectives, approaches, and life experiences to adjudication, which influence the interpretation and application of laws. To that end, legislative, administrative and judicial authorities responsible for judicial appointments and promotions, should move expeditiously and progressively to achieve gender parity."*[58] The Indian National Judicial Academy has expressed its commitment to promoting these guidelines throughout the country.[59]

## II. Process of Selection and Appointment to the Indian Supreme Court

The Constitution of India prescribes the method of selection and appointment of judges. Further mechanisms and procedures have been developed through three judgments of the Supreme Court in the 1980's and 1990's.

At present, in accordance with article 124 and 217 of the Constitution, judges of the Supreme Court and High Court are appointed by the executive branch of the State, on the basis of the selection and recommendation from the Collegium of Judges.[60] The Collegium is comprised of the Chief Justice of India and the four senior most judges of the Supreme Court. The 'Collegium' system of appointment of judges has been developed through judicial interpretation in an effort to insulate judicial appointments from executive control or undue influence, as well as to prevent the concentration of power with the Chief Justice of the Supreme Court. While article 124 of the Constitution provides that appointments are to be made by the President of India, in consultation with the Chief Justice of the Supreme Court, the Supreme Court through the *First Judges case and Second Judges case*[61] laid down that the Chief Justice of India shall exercise this power jointly with the four senior-most judges of the Supreme Court.[62]

The recommendations of the Collegium must be sent to the Union Minister of Law, Justice and Company Affairs, who puts up the recommendation to the Prime Minister, who in turn advises the President in the matter of appointment.

The Chief Justice of the Supreme Court is appointed by the President of India on the recommendation of the Prime Minister, who acts on the recommendation of the Minister of Law, Justice and Company Affairs, who in turn acts on the recommendation of the outgoing Chief Justice of India. As per convention,[63] the senior-most judge of the Supreme Court in terms of tenure is appointed as the Chief Justice. Judges of the Supreme Court are appointed by the President, again on the recommendation of the Prime Minister and Minister of Law, Justice and Company Affairs who acts on the recommendation of the Chief Justice. The Chief Justice is required to consult the Collegium or the four senior-most judges of the Supreme Court and a judge of the State High Court to which the Judge being recommended belongs.[64]

As detailed below, the Law Minister's powers can be exercised in a manner that functions as a veto against recommendations made by the Collegium, thereby giving the executive a crucial role in the selection and appointment process.[65]

Promotion of Judges in the higher judiciary does not exist as a separate process and falls within the system of selection and appointment. A person who has been a Judge of a High Court, or of multiple High Courts (since judges can be transferred from one high Court to another) for at least five years is eligible to be appointed as a Judge of the Supreme Court through promotion,[66] commonly referred to as "elevation". A

[58] International Commission of Jurists. Bangkok General Guidance for Judges on applying Gender Perspective in South and Southeast Asia, (2022), para 26.
[59] International Commission of Jurists. Press Statement: Six judiciaries from Asia commit to the Bangkok General Guidance for Judges on Applying a Gender Perspective, (May 2023).
[60] The Collegium comprises the Chief justice and four senior-most Judges of the Supreme Court. This system is not provided for under the Constitution or Statute, but has been developed through the Supreme Court's jurisprudence as an effort to prevent the concentration of decision-making powers solely with the Chief Justice.
[61] *Supra 8.*
[62] Discussed in detail later in this report.
[63] There have been only three departures from this convention. In 1964, the senior most judge was superseded on account of a medical condition. In the 1970's, during the Emergency declared by then Prime Minister Indira Gandhi, this convention was flouted in two instances. Malavika Parthasarathy, "How many times has the senior most judge of the Supreme Court been superseded" *Supreme Court Observer,* 10 February 2022.
[64] *Supra 8.*
[65] Department of Justice, *Memorandum of Procedure of Appointment of Supreme Court Judges*. Last updated 11 August 2021.
[66] CONSTITUTION, ARTICLE 124.

Judge from the High Court may be elevated to the Supreme Court. In effect, promotion falls within the broader category of selection and appointment of judges to the Supreme Court and no stand-alone instances of promotion or separate framework exists for promotions. In practice, a majority of judges appointed to the Supreme Court have been elevated from the High Court, and a relatively few number of judges are selected from the advocates and jurists

While in principle the judiciary retains primacy in the selection of Judges, the veto power enjoyed by the executive and the requirement that the President be the appointing authority have engendered a longstanding power struggle between the Judiciary and the executive regarding judicial appointments.[67]

Context shaping judicial appointments in India

The Constitution under article 124 provides that the President of India shall appoint Judges to the Supreme Court. However, the Constitution does not provide for the express power of the President to *select* judges, and is silent as to whether judges are to be selected and appointed by the executive or judiciary, or by a combination of the two. There is no statutory authority that presents clarity on this and the practice that is followed to date has been developed by the judiciary. This lacuna underlies the effective power struggle between the judiciary and the executive in matters of judicial appointments.

In order to understand the present situation, it is important to lay out the chronology of events that have shaped the present system of judicial appointments in India

Prior to independence, under the Government of India Act, 1935, the judges of the Supreme Court (then known as the Federal Court) and of the High Courts were appointed by the head monarch of the British Empire.[68] Post independence while the Constitution of Independent India was still being drafted, the manner of judicial appointment was deliberated on by the Constituent Assembly. Central to the constituent assembly debates was the need to maintain judicial independence, while also ensuring judicial accountability.

The Indian Constitution was adopted in 1949 and from the 1950s onwards, judicial appointments were carried out by the President of India, in consultation with the Chief Justice of the Supreme Court. A practice evolved whereby, whenever a vacancy arose, the Chief Justice of the Supreme Court would recommend a high court judge, advocate or jurist of their choice, as per the eligibility criteria under article 124 of the Constitution. The recommendation would be made to the Minister of Law and Justice, who in concurrence with the Prime Minister, would advise the President to appoint the high court judge, advocate or jurist as a Judge. If the Minister of Law and Justice did not agree with the recommendation, the Minister had the option of disregarding the Chief Justice's recommendation and recommending another person to the President. The practice also entailed the senior most judge of the Supreme court being appointed as the Chief Justice.

Inherent weaknesses in this system were exposed most starkly in the 1970s during the tenure of Prime Minister Indira Gandhi and the declaration of a National Emergency. This period witnessed the emergence of a pattern of what was termed by lawyers and legal scholars as 'committed judiciary' (committed to the executive).[69] In two instances, first in 1973 and then again in 1997, the seniority norm was breached by the President in appointing as Chief Justices, judges who were not senior-most. The appointment of the Chief Justices of the High Courts of states, and the transfer of judges between High Courts were also criticized by prominent lawyers, jurists and legal scholars, who asserted that the executive was responsible for superseding independent Judges and favouring those who were seen to favour the government.[70] Instances of "court-packing", whereby changes to the composition of the judiciary are effected *en masse* in pursuit of a political or ideological objective, as well as the mass transfer of high court judges, both under the authority of the selected Chief Justices exacerbated the real and perceived apprehensions of the executives undue influence over the judiciary.

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[67] Diksha Munjal, "Why is the NJAC Verdict at the Centre of the Impasse over Appointment of Judges?", *The Hindu*, 26 January 2023.
[68] Government of India Act, 1935, Section 200(2), 200(3), 220(2) and 220(3).
[69] *In 1973, at the acme of Prime Minister Indira Gandhi's move towards securing a "committed judiciary", the then Minister of Steel and Mines, S. Mohan Kumaramangalam, offered a spirited defence of the government.*
Suhrith Parathasarathy, "Is the SC Collegium compromising judicial independence" in The Caravan, 1 August 2014.
[70] Abhinav Chandrachud. *Supreme Whispers*. New Delhi: Penguin Viking, 2018; Granville Austin. *A 'Grievous Blow': the Supersession of Judges", in Working a Democratic Constitution: A History of the Indian Experiment*. New Delhi: Oxford University Press, 2003.

This period witnessed the beginning of a series of Petitions filed by judges affected by transfers, senior advocates of the supreme court's bar association, and queries from the President of India, which resulted in the emergence of jurisprudence by the Supreme Court on the appointment of judges, role of the executive and separation of powers. These legal challenges and the resulting judgments revolved primarily around the question of whether the executive was required to "consult" with the judiciary before appointing judges, or whether it needed the "concurrence" or active agreement of the judiciary to carry out these appointments. This question was answered in a series of three judgments of the Supreme Court, commonly referred to as the *First Judges case, the Second Judges case and the Third Judges case,* which established the collegium system of appointments.

The Supreme Court in 1981 in the *First Judges case*[71] held that the requirement of consultation did not mean that the President necessarily had to have the active concurrence of the judiciary before making appointments, and that the President could appoint judges without the concurrence of the Chief Justice and Judges of the Supreme Court. In 1993 the Supreme Court in the *Second Judges case*[72] reversed the precedent it had in the *First Judges case* and held that the President required the concurrence of the Chief Justice of India, as well as the two senior-most judges of the Supreme Court before making an appointment, thereby laying the ground for the 'Collegium System'. In 1998, through the *Third Judges case*[73] the Supreme Court further developed the Collegium system into its present form. It reiterated the need for concurrence and not mere consultation, and also established that concurrence was required not merely from the Chief Justice, but also from the four senior-most Judges of the Supreme Court (as opposed to two senior most judges required by the Second Judges case), collectively known as the Collegium.

*Collegium System and the Memorandum of Procedure*

Ever since the *Third Judges Case* judgment was issued, Judges to the Supreme Court have been selected by the Collegium, and recommended to the Minister of Law and Justice of the Union government. The Law Minister has the power to consider the names and accept them. It does not have the power to reject names, but may send them back to the Collegium for reconsideration. This power is sometimes used as the power to reject. If a name is sent back to the Collegium, the Collegium may replace it with another name or choose to send the same name back to the Union government. Only the Union government has the authority to forward names of judges to the President for appointment. This system has now been formalized in a 'Memorandum of Procedure of appointment of Supreme Court Judges.'[74] This system has resulted in a situation where, the power to select and recommend names is with the Judiciary, but the Executive has the effective power to veto recommendations by the Judiciary.

*National Judicial Appointments Commission*

In 2014, soon after assuming power,[75] the BJP government enacted the National Judicial Appointment Commission Act, 2014[76] (NJAC Act, 2014) through a Constitutional amendment.[77] The NJAC Act, 2014 replaced the existing Collegium system with a National Judicial Appointments Commission. The Commission was to be composed of the Chief Justice of India, two senior judges of the Supreme Court, the Union Law Minister and two "eminent persons" selected by a committee of the Prime Minister, the Chief Justice of India, and the Leader of Opposition.[78] This Constitutional amendment and the NJAC Act, 2014 was challenged and struck down by the Supreme Court in October 2015 on grounds of compromising judicial independence since it did not safeguard judicial primacy in the selection and appointments process. The presence of the Law Minister and two nominees of the government in the appointments commission was seen as compromising independence in favour of the government and undermining judicial primacy. Judicial primacy in the appointment process was held to be integral to the separation of powers which forms the 'basic structure' of the Constitution precluding it from being amended by an Act of parliament.[79]

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[71] *Supra 8.*
[72] *Supra 8.*
[73] *Supra 8.*
[74] *Supra 65.*
[75] It must be noted that prior to this, in 2013, the Congress led UPA government too introduced the National Judicial Appointment Commission Bill, 2013, however the same lapsed and was withdrawn. The 2014 bill was introduced by the BJP government, however it was supported by all political parties. Maneesh Chhibber, "In Parliament: BJP to Congress, Nobody Voted Against Bill", *The Indian Express*, 17 October 2015.
[76] The National Judicial Appointment Commission Act, 2014.
[77] The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, Bill No. 97 of 2014.
[78] *Ibid*, Section 3.
[79] *Supreme Court Advocates-On-Record ... vs Union Of India*. 2016 (5) SCC 1, judgment of 16 October 2015

*Judicial Appointments from 2014 to 2024*

The challenge to the NJAC was heard by the Supreme Court over several months and effectively renewed public debate on the issue of judicial appointments. Many who opposed the NJAC and saw it as an effort to consolidate executive control over judicial appointments were at the same time concerned that the present Collegium system suffered from infirmities. What was lacking was fixed criteria for selection of judges and the lack of transparency in the Collegium's functioning, a deficiency that has been highlighted by sitting and retired judges of the Supreme Court and High Courts.[80] The Supreme Court too, in its judgment striking down the NJAC, acknowledged the limitations of the Collegium system, asserting that *"the procedure for appointment of judges as laid down in these decisions read with the (Revised) Memorandum of Procedure definitely needs fine tuning."*[81]

Since the NJAC judgment, the Collegium has made efforts to fill vacancies in the Supreme Court and the High Court by recommending names of Judges. The Department of Justice headed by the Law Minister sent back several recommendations for reconsideration by the Collegium, in effect delaying or vetoing recommendations of the Judiciary. This has led to a public back and forth between the Supreme Court collegium and the Union Government acting through the Law Minister and Department of Justice, with the Chief Justice claiming that the executive had been blocking its efforts to fill vacancies and trying to control judicial appointments, and the executive claiming that the judiciary was overstepping its role and interfering in governance.

For instance, in October and November 2016 the Supreme Court Collegium, headed by Chief Justice T.S. Thakur, recommended 77 judges to fill vacancies in the Supreme Court and the High Courts. The Law Ministry accepted 34 names and sent back 43,[82] while also allegedly engaging in unjustified delays in carrying out the appointment of 34 names that were accepted.[83] The Supreme Court in November 2018, again recommended the 43 judges whose names had been sent back by the Law Ministry. In 2016 the then Chief Justice Thakur publicly accused the government of trying to "*decimate the judiciary and lock justice out.*"[84] The intention of the executive was made clear by public statements of Ravi Shankar Prasad, the then Law Minister, speaking at a public event marking the anniversary of adoption of the Constitution of India: *"The court must quash the orders, the court must set aside laws which are found to be wanting in constitutional compliance. But governance must remain with those who are elected to govern."*[85] Mukul Rohatgi, the then Attorney General asserted in a public event on the same day, that *"[t]he judiciary must realize that it has a lakshman rekha (limit/boundary) to follow. Greater the power, greater should be the circumspection, only then equilibrium will be restored."*[86]
Between 2014 and 2018 the number of vacancies in the Supreme Court and High Courts, including the positions of the Chief Justices of the High Courts increased, many for a prolonged period. However, no resolution was reached, with the government refusing to clear recommendations made by the Collegium and the Collegium declining to reconsider nominations that it had recommended.

*Memorandum of Procedure of Appointment of Supreme Court Judges*

The Memorandum of Procedure of Appointment of Supreme Court Judges *(*MoP)[87] was and continues to be another source of conflict between the judiciary and the executive. The MoP, while not formally binding, are procedures for the appointment of judges to the Supreme Court and the High Courts. Memoranda with procedure for appointment existed prior to independence. However, these were updated and codified into a 'Memorandum of Procedure' in 1999 to reflect the outcome of the Second Judges case.[88] One legal commentator describes it as "*document that would concretise certain procedural details pertaining to file movements between the collegium and the executive and time limits in the process of judicial appointments,*

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[80] Apoorva Mandhani, "Recording reasons is fundamental to transparency, Justice Chelameswar justified in Asking for it: Justice Ruma Pal", *Live law,* 26 September 2016; Correspondent, "My fight is for transparency, says Justice Chelameshwar*", The Hindu*, 5 September 2016
[81] *Supra 80* at para 569.
[82] Anusha Soni, "Judicial Appointments Stand Off: Collegium Sends 43 Names Back to Centre for Reconsideration", *India Today*, 18 November 2016.
[83] Correspondent, "Govt. Returns 43 Names Cleared for HC judges", *The Hindu*, 2 December 2016.
[84] *Ibid.*
[85] ANI, "Judiciary Should Not Interfere in Governance: Prasad", *Business Standard*, 26 November 2016.
[86] Legal Correspondent, "Lakshman Rekha for Judges", *The Telegraph*, 27 November 2016.
[87] *Supra 65.*
[88] *"It is appropriate that a memorandum of procedure be issued by the Government of India to this effect, after consulting the Chief Justice of India, and with the modifications, if any, suggested by the Chief Justice of India to effectuate the purpose." Supra 8,* Second Judges case, Supreme Court of India, *Supreme Court Advocates-On-Record ... v. Union Of India*, AIR 1994 SC 268, judgment of 6 October 1993 at Para 478(13).

*which were laid down by the Supreme Court itself."*[89]

The Memorandum was drafted by the Ministry of Law and Justice, in connection with articles 124, 217 and 224 of the Constitution, and it contains the procedures for the appointment of Judges to the Supreme Court, the High Court and for the transfer of Judges between Courts. For example, on the appointment of Judges to the Supreme Court the memorandum says that whenever a vacancy is expected to arise in the Supreme Court, the Chief Justice of the Supreme court should forward a recommendation for appointment to the Union Minister of Law, Justice and Company Affairs. The opinion of the Chief Justice should be formed in consultation with the four senior-most judges of the Supreme Court. The opinion of the Chief Justice and four senior-most judges should be forwarded to the Government of India. After receipt of this recommendation the Union Minister of Law, Justice and Company Affairs should forward the recommendations to the Prime Minister who will advise the President in the matter of appointment. As soon as the warrant of appointment is signed by the President, the Secretary to the Government of India in the Department of Justice should announce the appointment and issue the necessary notification in the Gazette of India.[90]

Following its December 2015 judgment striking down the NJAC, the Supreme Court directed the union government to review the MoP in consultation with the Chief Justice of India.[91] The Ministry of Law and Justice revised the MoP and sent it to the then Chief Justice in March 2016 and again in July 2016. A year later the Collegium wrote to the government, rejecting most of the substantive changes introduced into the MoP by the government, including a clause providing that the government should have the power to reject any name for the appointment of a judge for reasons of "national security". The collegium also rejected other proposals of the government to review the selection process. These included the setting up of a permanent secretariat to assist the collegium by "vetting and screening" the candidates; formally involving all sitting high court judges, senior advocates and state Advocate General in suggesting names from among lawyers for elevation; and setting up a formal mechanism to assess "merit and integrity" to decide which high court chief justice should be elevated to the Supreme Court.[92]

In October 2017, a Petition filed in the Supreme Court sought finalization of the MoP, in terms of the NJAC judgment. The Supreme Court issued notice to the Attorney General that *"there should be no further delay in the finalisation of MOP in larger public interest."*[93] As of 2024, the Union Government and Ministry of Law and Justice has yet to submit a revised MoP. Since then, the Law Minister's position has been that the MoP is pending with the Supreme Court Collegium, while the Supreme Court's maintains that the existing (unrevised MoP) is final and applicable.[94]

The Chief Justice and the Supreme Court Collegium have maintained the position that the procedure of appointments should be settled through the MoP, However, the Law Minister's position has been to treat the MoP as a temporary measure, retaining the space to push for a different system.

In March 2023, a member of Parliament from the Aam Aadmi Party posed a parliamentary question on *"(a)whether there exists any uniform process for implementing Collegium recommendations on the appointment and transfer of judges throughout the country... and (c) whether Government proposes to modify the Collegium System and formulate a new Memorandum of Procedure for appointment of Judges?"* The then Law Minister, Kiren Rijiju, while acknowledging that the MoP presently served as the basis for judicial appointments and transfers, reiterated the government's position that revision of the MoP was pending with the Supreme Court.[95] A 2023 parliamentary Report also held this view, by observing that *"[t]he committee is surprised to note that the Supreme Court and the government have failed to reach a consensus on revision of the Memorandum of Procedure (MoP) for appointment of judges to the constitutional courts (SC and the 25 HCs), though the same is under consideration of both for about seven years now."*[96]

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[89] *Supra 10,* at page 53.
[90] *Supra 65.*
[91] *Supra 80.*
[92] Maneesh Chhibber, "MoP on Appointments: SC Puts Its Foot Down, Rejects Govt Plan to Veto Postings on National Security Grounds", *The Indian Express*, 24 March 2017.
[93] Supreme Court of India, *R.P. Luthra vs Union of India*, Diary No. 22906/2017, Order of 27 October 2017
[94] Supreme Court of India, *The advocates association Bengaluru v. Barun Mitra and Anr*, 2022 LiveLaw (SC) 1013, Order of 8 December 2022.
[95] Department of Justice, Rajya Sabha Unstarred Question No. 1877, Uniform process for implementation of Collegium recommendation, answered on 16 March 2023.
[96] Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Report on Judicial Process and their Reform, Rajya Sabha, Parliament of India, 133rd Report, 7th August 2023.

This dense narration shows the manner in which the Union government through the Ministry of Law and Justice has consistently pushed for the constitution of a commission or panel to select Judges in an effort to wrest the power of selection out of the sole purview of the judiciary.[97] In essence, after the NJAC judgment of 2015, the Supreme Court, while striking down a judicial appointments commission, has recognized the need for reform of the existing manner of selection and appointment of judges. The Ministry of Law and Justice has subsequently revised the MoP, but the draft has not been accepted by the Supreme Court, reportedly because it had been conceived with inputs from intelligence agencies under the Union Government.

An important point of contention has been the grounds for the exercise of the effective veto power of the Ministry of Law and Justice, as well as the manner that it might be exercised. It is common for recommendations made by the collegium to be rejected by the executive on the basis of intelligence reports[98] that are not made public. There have also been instances where the executive did not expressly reject a recommendation, but simply failed to implement it and provided no reasons for their inaction.

A telling example of a rejection of a Collegium recommendation by the Union government is the case of Advocate John Sathyan, who was recommended by the Collegium in 2022 to be appointed as Judge of the Madras High Court. The Union government gave the following reasons for rejecting the recommendation: *"As per open sources, two posts made by him, i.e. sharing of an article published in 'The Quint', which was critical of the Prime Minister, Narendra Modi; and another post regarding committing of suicide by medical aspirant Anitha, who ended her life in 2017 since she was unable to clear NEET, portraying it as a killing by 'political betrayal' and a tag stating 'shame of you India' came to notice."*[99] The Collegium again recommended John Sathyan just months later,[100] but the appointment has not been acted upon by the government.

Another illustration is the case of lawyer Saruabh Kirpal. On four different occasions between 2018 and 2022, the Collegium recommended Saurabh Kirpal for appointment as a Judge in the Delhi High Court. The Union government on each occasion refused to make the appointment.[101] The Supreme Court reiterated its recommendation through a resolution (a document registering Collegium administrative actions), which disclosed the government's objections as follows: "*(i) the partner of Shri Saurabh Kirpal is a Swiss National, and (ii) he is in an intimate relationship and is open about his sexual orientation*."[102]

It is important to note that the government's refusal to make an appointment, without sending it back to the Collegium, is a situation not envisaged by the MoP, but has nonetheless been a frequent strategy of the government to block recommendations without having to give reasons.

There are other instances where the Collegium, on its own, acts in a manner that appears to undermine its own independence and impartiality. Instances of well-reputed judges of the High Court not being recommended for elevation by the Collegium, particularly when these judges have delivered orders that hold the executive or ruling party accountable, have given rise to a frequently expressed perception among lawyers and the public that their exclusion is on account of executive influence or interference.

For example, in 2019 the Collegium's recommendation to appoint Justice Akil Kureshi of the Gujarat High Court as Chief Justice of the Madhya Pradesh High Court was not accepted by the Union government. The Gujarat High Court Advocates Association passed a resolution contesting this outcome, and its President said "orders issued by Justice Kureshi against Home Minister Amit Shah (then minister in Gujarat) and PM Modi that "cost him his elevation" despite being the most senior.[103] It was also reported on by media outlets that

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Press Trust of India, "Parliamentary Panel 'Surprised' That Govt, SC Failed to Arrive at Consensus on MoP Despite Lapse of Nearly 7 Years", *The Hindu*, 5 January 2023.

[97] Letters written by the then–law minister to the Chief Justice of India in 2021 and 2023, see Bhadra Sinha, "Rijiju Writes to CJI, Wants Panels With Govt Reps to Advise Collegium On Judges' Appointments", *The Print*, 16 January 2023; Bhadra Sinha, "Modi Govt Proposal to Appoint Retired Judges to HCs Involves Law Ministry, President's Nod", *The Print*, 14 December 2022.

[98] Reports prepared and submitted by the Research and Analysis Wing(RAW), an external intelligence agency and the Intelligence Bureau (IB) an internal security and counterintelligence agency which function under the Prime Minister and the Ministry of Home Affairs respectively.

[99] Supreme Court of India Collegium, "Statement" 17 January 2023.

[100] Supreme Court of India Collegium, "Statement" 21 March 2023.

[101] Paras Nath Singh, "Is the Centre Exercising its Pocket Veto by Not Appointing Saurabh Kirpal as HC Judge, Even Four Months After the Supreme Court Collegium's Recommendation?", *The Leaflet*, 24 March 2022.

[102] Supreme Court of India, "Collegium Resolution recommending Mr. Saurabh Kirpal to be appointed as a Judge of the Delhi High Court", 18 January 2023.

[103] Debayan Roy, "Orders against Modi, Shah reason why Justice Kureshi elevation was stopped: Gujarat lawyers", The Print, 10 June 2019.

the government's failure to accept the nomination was a reaction to the Judge having made an order remanding Amit Shah, presently the Union Home Minister, to custody as an accused in a case of extra-judicial killing, and to other orders not favourable to the government of Gujarat.[104] Subsequently, the collegium failed to recommend Justice Kureshi for elevation to the Supreme court, despite his advanced seniority and impressive reputation among High Court Judges. Internal disagreements within the collegium were reported by media sources, that Justice Nariman had refused to agree with any collegium recommendations for two years, unless Justice Kureshi's was included for elevation. This also indicates that the Chief Justice and other Judges were opposed to Justice Kureshi's elevation.[105]

Similarly, Justice Muralidhar retired as Chief Justice of the Odisha High Court without being elevated to the Supreme Court. Justice Madan Lokur, retired judge of the Supreme Court, the late jurist Fali Nariman[106] and senior advocate Sriram Panchu wrote an open letter questioning the collegium's non-elevation of Justice Muralidhar to the Supreme Court.[107]The letter indicated, among other factors, Justice Muralidhar's questioning of the Delhi Police regarding inaction against taken against BJP leaders for hate speeches that led to the violence against Muslims in Delhi in 2021.[108]

In this context it is important to note, that while withholding recommending Judges who are seen to hold the executive to account, the Collegium has also proactively recommended L Victoria Gowri for appointment as a High Court Judge who, was appointed despite appeals by lawyers bodies and legal challenges predicated on charges that she had engaged in anti-Muslim hate speech.[109] Refusing to hear challenges to the appointment, the Supreme Court said that "suitability" to the post was a matter of consultation by the collegium and beyond their scope of review.[110]

Such examples are illustrative of the reality that judicial appointments are often made or refused based, not on objective or predetermined criteria related to the legal expertise and competence of the Judge, but instead influenced by extraneous factors. These factors range from the concentration of power with the collegium, the process adopted by the Collegium which leaves room for arbitrariness and power struggles among branches of government, where consideration of objective criteria is non-existent or have little purchase.

## III. Process of Selection and Appointment to the High Courts

Article 217 of the Constitution provides that Judges of the State High Courts be appointed by the President of India.[111] The Chief Justice of the High Courts are recommended by the Chief Justice of the Supreme Court in consultation with the Governor[112] of each State where those judges would sit. Judges of the High Court are recommended by the Collegium of that High Court, comprising the Chief Justice of the High Court and the two senior-most judges, and must be approved by the Supreme Court Collegium in consultation with the governor of the concerned State. The role of the Governor in the appointment of High Court Judges has the effect of giving the Union government undue influence in the appointment. The Governors of the States are appointed by the President of India on the advice of the Prime Minister. Governors are appointed and removed by the President on the advice of the Union Government. In practice, Governors of States are seen to act at the behest of the Union Government, illustrated by recent instances of State government's

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[104] High Court of Gujarat, *Central Bureau of Investigation vs Amit Shah*, SCR.A/1497/2010, Order of 6 August 2010; *"In 2010, J Kureshi had remanded BJP leader Amit Shah, who was then junior Home Minister of Gujarat, to two days Police Custody in relation to the Sohrabuddin encounter killing case. Justice Kureshi's 2012 decision upholding the Governor's appointment of (Retd) Justice RA Mehta as Lokayukta was a set back to the state government."* Manu Sebastian, "Justice Kureshi's exclusion from the Supreme Court raises troubling questions" *Live Law*, 30 August 2021.

[105] Aarathi Ganesan and Ayushi Saraogi, "Justice Akil Kureshi Retires Without Elevation to the Supreme Court", *Supreme Court Observer*, 10 March 2022.

[106] Fali Nariman served as an Commissioner from 1988 and subsequently as an Honorary Commissioner until his recent death.

[107] *"He granted bail to Gautam Navlakha, one of the activists arrested in the Bhima Koregaon case. During the Delhi riots in 2020, he held a late night sitting to mandate ambulance services to victims and rehabilitation measures. His Bench slammed the Solicitor General and the police for not registering cases against BJP leaders for provocative speeches; this obviously led to his hurried transfer to Punjab and Haryana HC by an executive midnight order",* Fali Nariman, Madan Lokur and Sriram Panchu, "A question for the collegium: Why was justice Muralidhar not brought to the Supreme Court" *Indian Express*, 19 April 2023.

[108] Karan Tripathi, "Delhi HC Plays Kapil Mishra's speech in Court for Police Viewing; Seeks Response of Solicitor General" *LiveLaw.in, 26 February 2020.*

[109] Krishnadas Rajagopal, "The saga of appointing Justice Victoria Gowri" *The Hindu,* 13 February 2023.

[110] Supreme Court of India, *Anna Mathews vs Supreme Court Of India*, Writ Petition (Civil) No. 147 Of 2023, Order of 10 February 2023; Aswtika Das, "Madras HC Advocates Urge SC Collegium To Recall Proposal To Elevate Victoria Gowri Citing Statements Against Minorities & Political Affiliation" *LiveLaw.in*, 2 February 2023

[111] CONSTITUTION, ARTICLE 217.

[112] CONSTITUTION, ARTICLE 217.

petitioning the Supreme Court against various acts of their Governors.[113] The Memorandum of Procedure for appointment of judges of High Court's (MoP of High Courts)[114] provides that once a judge is recommended by the Chief Justice, the Union Minister of Law, Justice and Company Affairs must obtain the views of the relevant State government, then submit its recommendation to the Prime Minister, who then is to advise the President as to the judge's appointment. This process again gives the executive a decisive role and veto power.

The MoP of High Courts requires that, as a matter of practice, the Chief Justice of a High Court shall be a person not drawn from the High Court of that State.[115]

## IV. Failure to Establish Conditions of Competence or Merit in Judicial Appointments

A glaring deficiency in India's system of selection of Judges is the lack of a requirement to apply appropriate and objective fixed criteria to assess competence to serve as a Judge of either the High Courts or the Supreme Court. The Constitution of India prescribes qualifications for appointment of judges: that the person must be a citizen of India; that they should have spent at least five years serving as a Judge of a High Court or two or more High courts in succession; or that they should have spent at least ten years practising as an advocate of a High Court or two or more High Courts in succession; or that they are, in the opinion of the President of India, a distinguished jurist.[116] Equivalent provisions exist for selection of High Court Judges.[117] These qualifications merely determine baseline eligibility to be selected as a Judge and do not serve as criteria which would ensure selections based on merit, or even minimum competency.

As explained above, the UN Basic Principles on the Independence of the Judiciary indicate that *"[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law"*[118] and that *"[t]o enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence."*[119]

Determination of integrity, independence, proven competence, and merit is left to the discretion of the Collegium and its individual members, without any indication that they are applying any fixed specific criteria to make such determinations. There is no evidence of established rules or procedures that govern the Collegium's decision making in this regard, including objective or pre-determined selection criteria on the basis of which Judges are selected. The Collegium selects and recommends judges through 'resolutions'. These resolutions were made public only in 2017[120] in response to criticism including by sitting judges of the opacity of the Collegium system and the refusal of a sitting senior judge, Justice Chelameswar, to participate in the Collegium until the introduction of transparency in the process.[121] However, the Collegium resolutions which are now publicly available only contain the final decision reached, with many resolutions not containing any substantive reasoning. Further, discussions and deliberations of the Collegium have been exempted from disclosure.[122]

These Collegium resolutions recommend the elevation of high court judges to the Supreme Court, the transfer of judges from one high court to another and the names of persons to be appointed as Judges of High Courts, including as Chief Justice of High Courts. An examination of the resolutions made public since 2017 reveal a near rote reproduction that the candidate has been assessed on *"fitness and suitability"* and that *"the judgments authored by him are well-reasoned, contain an analysis of the facts of the cases and are backed by appropriate case laws."*[123]

Resolutions recommending the transfer of judges from one high court to another contain no reasoned assessment against the criteria required for transfer laid down by the Supreme Court. Instead, they simply use the terms 'public interest' and 'better administration of justice'.[124] For instance, a 2019 resolution on

[113] Krishnadas Rajagopal, "States in Court against their Governors" *The Hindu*, 6 November 2023.
[114] Department of Justice, Memorandum of Procedure of appointment of High Court Judges, No date.
[115] *Ibid*.
[116] CONSTITUTION, ARTICLE 124(3).
[117] CONSTITUTION, ARTICLE 217.
[118] *Supra 22*, Principle 10.
[119] *Supra 44,* Principle 11.
[120] Supreme Court of India, *Re: Transparency in Collegium System* 3 October 2017.
[121] Correspondent "My fight is for transparency, says Justice Chelameshwar", The Hindu, 5 September 2016.
[122] Supreme Court of India, *Anjali Bhardwaj v. CPIO*, 2022 Livelaw SC 1015, Order of 9 December 2020.
[123] For instance, see Supreme Court Collegium, Appointment Notification, 17 May 2024; Supreme Court Collegium, Notification for Madhya Pradesh High Court, 29 January 2022.
[124] For instance, see Supreme Court Collegium, Transfer Notification, 28 October 2021; Criteria for transfer is discussed later in the

transfer states that "*[t]he Collegium resolves to recommend that Mr. V. Muralidharan, Judge, Madras High Court, be transferred, in the interest of better administration of justice, to Manipur High Court".*[125]

Similarly, resolutions which defer or withhold recommendation of advocates for judgeship merely state that the recommendation is being deferred, without providing any reasons.[126]

## V. Equality, Equal Protection and Non-Discrimination in Selection

The Indian Constitution guarantees protection against discrimination on the basis of religion, race, caste, sex and place of birth, while also providing for special measures for the advancement of women, children and socially and "economically backward" classes of citizens.[127] Specific provisions mandate reservation for socially and economically "backward" classes, including members of the scheduled caste and scheduled tribe communities in public employment.[128] However, at present, the Indian system of selection and appointment of judges does not include special measures either through affirmative action or through quotas, to ensure equal representation of women and for persons belonging to the scheduled caste and scheduled tribe communities in selection and appointment to the High Courts and the Supreme Court. A practice has evolved to endeavour to select judges from different regions of the country, developed as unwritten criteria to account for regional diversity.

The representation of women judges in the High Court and Supreme Court is low at 13 percent.[129] A 2023 submission in Parliament by the Union Law Minister shows that less than 25 percent of High Court Judges are drawn from the Scheduled Caste and Scheduled Tribe communities. Notably, with regard to representation in the Supreme Court, he submitted that "*no category-wise data in respect of Supreme Court Judges is available with the Government."*[130]

With regard to religious diversity and representation from minority religions, no official data exists on judges in the High Court and Supreme Court on the basis of religion. Unofficial analysis using the name of the judge as an indicator of the religious community shows that the judiciary has always comprised a disproportionate majority of judges from the Hindu community. In 2023, an analysis shows that of the 33 judges, 30 were from the Hindu community and one each from the Muslim, Christian and Parsi community. It also shows that since 1950 there have been between one to three Muslim judges at any given point of time, even though Muslims comprise around 14 percent of the population.[131]

The judiciary does not provide for reservation of a percentage of vacancies for persons from marginalized or disadvantaged communities. In 2022 the Ministry of Law and Justice issued a public statement that the mandate of "reservation" is not applicable to the judiciary. This is because "*[a]ppointment of Judges of the Supreme Court and High Courts is made under Articles 124, 217 and 224 of the Constitution of India, which do not provide reservation for any caste or class of persons."*[132] Constitutional provisions on appointment of judges have been interpreted by the Ministry of Law and Justice to exclude and override the constitutional mandate to provide reservations. The government's position on representation of women in the judiciary follows a similar approach, since 2023 the government has maintained that its role is restricted to implementing recommendations made by the Judiciary, and it cannot ensure selection of women judges.[133] It has, however, issued a press statement asserting: "*the Government has been requesting the Chief Justices of High Courts that while sending proposals for appointment of Judges, due consideration be given to suitable candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes, Minorities*

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report.
[125] Supreme Court Collegium, Transfer Notification, 15 January 2019.
[126] Supreme Court of India, Appointment Notification, 16 January 2019.
[127] CONSTITUTION, ARTICLE 14 and 15.
[128] CONSTITUTION, ARTICLE, 16.
Department of Personnel and Training, *Frequently Asked Questions (FAQs) on the Policy of Reservations to SCs, STs, and OBCs*, no date.
[129] Government of India, Ministry of Law and Justice, Department of Justice, *Appointment of Judges in the Supreme Court and High Courts*, Rajya Sabha, Unstarred Question no. 598, 7 December 2023.
[130] *Ibid*
[131] Leena Gita Regunath and Sushovan Patnaik, *Supreme Court Review 2023: The diversity problem remains unaddressed,* 4 January 2024; As per Census 2011, Muslim population is 17.22 crore which constitutes 14.2% of the total population of the country. See, Government of India, Ministry of Minority Affairs, Muslim Population, Lok Sabha, Unstarred Question no.46, 20 July 2023.

[132] Ministry of Law and Justice, *Judges Belonging to SC, ST and OBC Communities*, *Press Information Bureau*, 31 March 2022.
[133] Department of Justice, No date. *Justice-I*, no date.

*and Women to ensure social diversity in appointment of Judges in High Courts. Government appoints only those persons as Judges of the Supreme Court and High Courts who are recommended by SCC."*[134]

**Conclusion: Selection and Appointment**

The appointment of judges and the selection of judges have to be assessed separately. The appointment process allows the executive branch to either "send back" recommendations by the Judiciary or simply not carry out the appointment. This effectively allows a margin of executive control or undue influence in determining judges' appointment to the High Court and Supreme Court, making the appointment of judges prone to external and improper influence and interference. In practice, this executive power has been exercised in an arbitrary manner, resulting in Collegium recommendations being stalled where judicial vacancies are not filled, pendency and backlog of cases increase, disposal of cases are delayed, all of which detrimentally effect access to justice.

The Collegium system of selection of Judges also fails to ensure that "*the procedures for appointment of judges [are] clearly defined and formalised and information about them [is] available to the public."*[135] No objective criteria have been prescribed for the selection of Judges, other than the requirement of a minimum number of years of work experience as an advocate or a judge and requirement of being a citizen of India. The Memorandum of Procedure too, only sets out the procedural elements, and does not provide guidance on criteria related to or reflecting the competence, ability or integrity of appointees. Further, the Collegium system is opaque and lacks transparency, with the process of selection and the basis of selection being withheld. Even when collegium resolutions began to be published in 2017, it was seen that they only contained generalized and boilerplate language, lacking substantive reasoning or evidence to support the recommendation for appointment, elevation/promotion or transfer of a judge.
In absence of selection criteria, no measures exist to prevent discrimination against women or persons belonging to historically marginalised castes and, religions or to ensure their greater representation.

[134] Ministry of Law and Justice, *Representation of Women in Courts*, *Press Information Bureau*, 3 February 2023;Government of India, Ministry of Law and Justice, Department of Justice, *Appointment of judges belonging to OBC's, SC's and ST's* Rajya Sabha, Unstarred Question no. 1390, answered on 14 December 2023.
[135] *Supra 44,* Principle 16.

## Part C: Transfer of Judges

### I. Applicable International Law and Standards

The UN Basic Principles provide that "*[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."*[136] The Beijing Principles also establish that judges must have security of tenure [137] and that "*[a] judge's tenure must not be altered to the disadvantage of the judge during his or her term of office."*[138] Transfer of judges, in certain circumstances, amounts to a change in the terms of office. According to the Beijing Principles: "*Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the judiciary, such consent shall not be unreasonably withheld by an individual judge."*[139] Other international standards similarly affirm that judges should in principle not be transferred without their consent.[140]

The use of transfers as disguised sanction has been acknowledged by the Special Rapporteur on the independence of judges and lawyers in his 2020 Report[141] as one of the most frequent kinds of disguised sanctions, which are often used in order to *"prevent a judge from adjudicating on a particular case or to punish and marginalise a judge regarded as too independent or unsympathetic to the Government's interests."*[142]

The practice of transfer used as a disguised disciplinary or sanction is problematic for several reasons. First, it violates the principle that security of tenure must be ensured, and conditions of service remain unaltered. The transfer of judges outside their home states, especially to remote areas. can constitute an adverse consequence on their work and lives.

Second, the perception or fact of transfers being used as disguised sanction threatens independent discharge of judicial duties, and carries a chilling effect on all High Court judges, that decisions that the executive finds unfavourable could expose them to an adverse transfer.

Finally, the process of transfer, even if used for the purportedly bona-fide purpose of warning or disciplining an errant judge, violates the standards required of disciplinary mechanisms for judges. Principle 18 of the UN Basis Principles affirms that *"judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."*[143] Principle 19 provides that disciplinary proceedings may only be imposed in accordance with established standards of judicial conduct, while Principle 17 provides that such proceedings must be based on an appropriate and fair procedure. Principle 20 requires the provision of an independent review of disciplinary proceedings.
The power and practice of transfer meet none of these standards. While transfer is not acknowledged as a disciplinary measure, the fact that it is used as one in practice points to the inadequacy of disciplinary mechanisms combined with the impossibility of impeachment which has led to transfers being used as means of disciplining judges. The use of transfer to discipline circumvents the rigorous requirements of a disciplinary process for judges which is designed to ensure judicial independence, and introduces arbitrariness and the possibility of retaliation which could affect judicial decision making in favour of the executive.

The former Special Rapporteur on independence of judges and lawyers in his 2020 Report contextualizes arbitrary transfers by observing that where the procedure for promotion and transfers is either not regulated by law or based on a procedure which is not followed in practice, promotion might be used as an undue means of influencing the work of judges and their independence. Transferring a judge without their consent is contrary to international standards, unless it is *"pursuant to a system of regular rotation or promotion formulated after due consideration by the judiciary"*.[144]

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[136] *Supra 22,* Principle 13.
[137] *Supra 44*, Principle 18.
[138] *Supra 44*, Principle 21.
[139] *Supra 44*, Principle 30.
[140] Judicial Integrity Group, Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures), (2010), Para 13.5; Singhvi Declaration, article 15; Beijing Statement, article 30.
[141] Diego García-Sayán, UN General Assembly. Report of the Special Rapporteur on the independence of judges and lawyers. Resolution A/75/172, (17 July 2020), para. 6.
[142] *Ibid.*
[143] *Supra 22.*
[144] *Supra 142*, para 70.

## II. Legal and Procedural Framework

Transfer of judges from one High court to another is provided for under the Indian Constitution,[145] as well as the MoP of High Courts applicable to selection and appointment.[146] The Chief Justice makes the recommendation for the transfer of a Judge from one High Court to another, but the recommendation is to be made only after the Chief Justice has taken into account the views of the Chief Justices of the High Court from which the judge is proposed to be transferred, as well the Chief Justice of the High Court to which the transfer is to be affected.[147] The Chief Justice is also required to take into account views of other Judges of the Supreme Court, who may have been elevated from the two concerned High Courts. The Chief Justice and the Collegium must consider these views and make a recommendation to the Union Law Minister.[148]

Prior to 1999 when the MoP was modified to its present form, the requirement of consent of the judge being transferred was a grey area, and was subject to deliberation in the *First, Second and Third Judges cases* as a facet of the broader issue of judicial appointments. These judgments essentially dealt with the question of whether the President needed the *concurrence* of the Chief Justice of India before appointing Judges, or merely needed to *consult* the Chief Justice of India, a question common to both appointments and transfers. The *Third Judges* case crystallized the position that in matters of transfer of judges between High Courts, the opinion of the Chief Justice and Collegium would be determinative. The judgment in the *Third Judges case* and subsequent judgments[149] hearing legal challenges from High Court Judges challenging their own transfer, read together, have resulted in the present position whereby the consent of the judge being transferred is not required under the rationale that such a requirement would render the power to transfer nugatory. Underlying this position is the understanding that transfers are deemed to be bona-fide and non-punitive, and that the only criteria to be considered while affecting a transfer is that of 'public interest.'[150]

The MoP of High Courts introduced in 1999 further clarifies that *"[c]onsent of a Judge for his first or subsequent transfer would not be required."*[151] The MoP affirms the criterion of "public interest", stating that *"[a]ll transfers are to be made in public interest i.e. for promoting better administration of justice throughout the country".*[152]

Public interest is not further defined except to connect it to the "administration of justice". Transfers were introduced through a 'transfer policy'[153] introduced in the mid-1990's, with the intention of transferring Judges who had relatives practising in the same court to different courts, and to ensure that each High Court had Judges from outside the State. The broader objective was to remove potential conflict of interest and ensure impartiality.

The lack of objective and fixed criteria for transfer of judges, the absence of recording detailed reasons, and the overall lack of transparency in the process of selection of judges for transfer, gives rise to risk of arbitrary transfers, including those conducted for improper political, corrupt or other improper motives.

In large part, the actual practice of transfer of judges between High Courts contradicts its purported objective of public interest and "administration of justice". There is evidence to show patterns of Judges being transferred either pursuant to allegations or financial corruption, or on account of judicial conduct and judgments which enforce executive accountability. Depending on the High Court to which the transfer is affected, transfers are typically seen by lawyers as well as the public, as an adverse measure.[154] Arbitrary transfers have fostered the public perception of transfers being used either as a means of disguised sanction or in a punitive or retaliatory manner. [155]

## III. Irregular Transfers Amounting to Punitive Action and Disguised Sanction

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[145] CONSTITUTION, ARTICLE 222.
[146] *Supra 115.*
[147] *Supra 115, part H.*
[148] *Supra 115, part H.*
[149] Supreme Court of India, *K. Ashok Reddy vs Government of India*, AIR 1994 1207, Judgment of 7 February 1994.
[150] *Supra 10.*
[151] *Supra 115.*
[152] *Supra 115.*
[153] *Supra 10.*
[154] In India there exists an informal hierarchy between High Courts, based on the nature of litigation that they entertain, the High Courts of Delhi, Bombay, Madras and Calcutta being at the top and High Courts of economically and socially backward or conflict prone States being lower down.
[155] K.Venkataraman, "Explained: Why are judicial transfers riddled by controversies" *The Hindu*, 21 November 2021.

Despite the existence of guiding criteria contained in the MoP, the transfer of judges in India is at best arbitrary and at worst punitive, in effect, if not intent. Transfers as punitive measures are often connected to the content of judges' decisions and whether they are favourable to the position of the executive. To understand punitive transfer of Judges it is important to point out the unwritten hierarchy between High Court's in India. The High Courts of Delhi, Bombay, Madras and Calcutta are favoured over those of relatively economically less developed regions. Often, judges have been moved from more important High Courts to less important ones.[156] Typically, whether a transfer is punitive and retaliatory or not can be inferred from the response of the bar, and lawyers in India have expressed their disagreement with transfers in several instances, especially in the past decade.
Irregular transfers and the role of executive officials in influencing transfers was manifest during two periods in India. The first was during the emergency declared by Prime Minister Indira Gandhi in 1975 and the second is in the post-2014 period after the present BJP government came to power.

Between 1975 to 1977 sixteen High Court judges were transferred to other courts without their consent, with a list of fifty-six proposed to be transferred leaked by the government.[157] This action was seen by much of the legal profession as a punitive measure in response to several High Courts upholding challenges to the Emergency Powers' derogations from fundamental rights, and as a warning to other judges to refrain from delivering judgments that did not favour the executive.[158]

More recently in 2016 jurists such as the former Attorney General for India Soli Sorabjee, the late Fali Nariman and K K Venugopal wrote an open letter to the then Chief Justice of India protesting the transfer of Justice Rajiv Shakdher from the Delhi High Court to the Madras High Court attributing the transfer to retaliation for the Judge's order quashing the Union government's curbs on activities of the environmental NGO Greenpeace.[159] As described earlier, in 2023 Justice Madan Lokur, retired judge of the Supreme court, Fali Nariman[160] and senior advocate Sriram Panchu wrote an open letter to the Collegium, questioning the non-elevation of Justice Muralidhar to the Supreme Court.[161] In 2020, Justice Muralidhar was transferred from the Delhi High Court to the Punjab and Haryana High Court, after which he was transferred and appointed Chief Justice of the Odisha High Court, but not elevated to the Supreme Court. These seemingly arbitrary transfers, appointment to a non-prominent High court and non-elevation to the Supreme court have been credibly attributed by the authors of the letter to his body of judicial decisions which have consistently held the executive to account.[162]

Other transfers, due to the lack of objective and predetermined basis for transfer, give rise to the risk of transfers being made as disguised sanction. In the case of allegations of impropriety or corruption against a judge, a transfer may be used as a means of warning and disciplining the judge. In 2016, media sources reported that the Collegium intended to affect "mass transfers" of judges accused of corruption and misconduct.[163] There is an inherent contradiction between transfers being used as a sanction, to effectively discipline an errant judge and transfers purporting to be in public interest. A judge involved in financial corruption for instance, cannot possibly serve administration of justice or public interest in the jurisdiction to which the judge is transferred.

**Conclusion: Transfer**

As with selection of judges, the competency to recommend transfer of judges from the High Court of one State to another is also held by the Collegium of the Supreme Court, with the executive having the power to carry out the transfer, effectively retaining the power to reject or indefinitely stall the transfer. In contravention of international law standards, the power to transfer a judge is not held by a judicial council or similar body that is independent of the judiciary and insulated from the executive.

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[156] *Supra 155.*
[157] T.R. Andhyarujina, 'A Committed Judiciary: Indira Gandhi and Judicial Appointments', in Arghya Sengupta and Ritwika Sharma (eds.) *Appointment of Judges to the Supreme Court of India: Transparency, Accountability and Independence*. New Delhi: Oxford University Press, 2018, pp. 18–30; Fali S. Nariman, "Resolving the 'Standoff' Over Judicial Appointments Will Take Two to Tango", The Wire, 29 August 2016.
[158] *Supra* 71; Christophe Jaffrelot and Pratinav Antil, "Ambivalent to the Core: How the judiciary capitulated or resisted during the Emergency", 8 February 2021.
[159] Maneesh Chhibber, "Jurists Protest Transfer of Delhi High Court Judge Who Gave Greenpeace Case Order", *The Indian Express*, 1 March 2016.
[160] Fali Nariman served as a Commissioner of the ICJ from 1988 and as a member of its executive Council in the 1990's.
[161] *Supra 108.*
[162] Centre for Human Rights, University of the Free State. Report of the Panel of Independent International Experts to Examine Information about alleged violations of International Law committed against Muslims in India since July 2019 (2022).
[163] A Vaidyanathan, "A Clean-Up Act in Judiciary: Collegium Wants Mass Transfers" NDTV, 13 February 2016

No fair or formal procedure is followed and the only prescribed criteria on the basis of which Judges can be transferred are 'public interest' and 'better administration of justice'. These categories without further specification by themselves are vague and overbroad, and lend themselves to the abuse and arbitrary exercise of the power of transfer and for transfers based on improper motive.

Arbitrary transfers undermine the guarantee of security of tenure, by allowing the conditions of work of a judge to be changed and also leads to the apprehension that judges are could be effectively punished for the content of their decisions rather than for actual misconduct. Due to the lack of transparency and substantively reasoned collegium resolutions, it is not possible to determine whether a transfer is made with proper motive or is arbitrary.

Transfer of judges between High Court's has been the subject of criticism in two types of circumstances. First when there may exist allegations or apprehensions of corruption against a Judge, the Judge is transferred as an unwritten "warning". This contravenes international standards which prohibit administrative transfers from being deployed as a disguised sanction and further, undermines the requirement that judges accused of misconduct must be subject to disciplinary proceedings and given a chance to defend themselves. If a judge has engaged in misconduct serious enough to warrant sanction, simply transferring the judge to continue their functions in another place without any formal finding of wrongdoing does not constitute appropriate accountability. The second kind of situation in which a Judge may be transferred is as a response to deliver judgments or orders perceived as unfavourable to wishes or interests of executive authorities. While ascertaining this category of transfers is an inherently speculative exercise, a system which may allow such a practice is in contravention of the prohibition on punitive or retaliatory transfers. As noted above, international standards prescribe that the terms and conditions of service should be adequately secured by law,[164] and that the tenure must not be altered to the judge's disadvantage.[165]

As it stands today, there is no formalized procedure and no requirement of consent of the concerned judge, leaving the power of transfer to the sole discretion of the Chief Justice, while giving the executive a determinative role, undermining internal as well as external independence of the judiciary.

[164] *Supra 22.*
[165] *Supra 44*, Principle 21.

## Part D: Judicial Accountability

### I. Applicable International Law and Standards

Judicial accountability is an indispensable corollary to judicial independence under the rule of law. Like all persons and entities exercising public authority, the judiciary and individuals are accountable for their conduct, though there are particular challenges to ensuring that measures of judicial accountability are not developed and applied in a manner that would undermine judicial independence.[166]

Under article 11 of the United Nations Convention Against Corruption, to which India is a party, States are obliged to take measure to combat corruption and ensure the integrity of judges, consistent with principles of judicial independence.[167]

While the UN Basic Principles address procedural elements of certain aspects of judicial accountability, the core substantive elements are contained in the Bangalore Principles of Judicial Conduct, which in turn was affirmed by the UN Economic and Social Council as constituting a critical complement to the UN Basic Principles.[168] An important commentary to the Bangalore Principles was developed by the UNODC Judicial Integrity Group.[169] The Bangalore Principles affirm as the six core values of judicial conduct the principles of Independence, impartiality, integrity, propriety, equality, and competence and diligence.

The UN Human Rights Committee has underscored the importance of independent bodies to enforce disciplinary rules for judges and that judicial oversight and discipline be implemented through the judiciary rather than the political branches of government.[170]

In respect of disciplinary matters, States must take appropriate measures to ensure that these processes are not used in an abusive or arbitrary manner. While internal judicial accountability mechanisms may be appropriate to monitor judicial independence, competence and objectivity, they must be prevented from being used as a retaliatory or internal pressure mechanism.

A judge has the right to be heard by an independent and impartial body against any accusation or complaint made about their judicial and professional performance. In accordance with international law, including obligations pursuant to article 14 of the ICCPR, any proscribed conduct subject to disciplinary proceedings, as well as the applicable procedure and the corresponding sanctions, must be previously established by law and the decision must be handed down with guarantees of due process.[171]

International law and standards on judicial accountability must be taken into account in complement with standards on security of tenure, providing that Judges should be assured security of tenure so that judicial accountability can be ensured without undermining judicial independence[172.]

Under international law and standards, including the Basic Principles on the Independence of the Judiciary, judges may only be suspended or removed from office for incapacity or for conduct that disqualifies them from continuing to perform their functions.[173] With regard to judicial conduct, the Bangalore Principles provide guidance on the standards of integrity and propriety that must be adhered to by Judges.[174]

A judge has the right to be heard by an independent and impartial body against any accusation or complaint made about their judicial and professional performance.[175] In accordance with international legal obligations, including under article 14 of the ICCPR, the conduct that has attracted disciplinary proceedings, as well as the applicable procedure and the corresponding sanctions, must be previously established by law and the decision must be handed down with guarantees of due process.[176] Procedural and substantive guardrails for

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[166] *Supra 27.*
[167] UN Convention against Corruption ("UNCAC"), 2349 UNTS 41.
[168] United Nations Office on Drugs and Crime, Bangalore Principles of Judicial Conduct ("Bangalore Principles"), ECOSOC resolution 2006/23 (2006), Annex.
[169] UN Office on Drugs and Crime (UNODC), Resource Guide on Strengthening Judicial Integrity and Capacity (2011).
[170] *Supra 21.*
[171] *Supra 21.*
[172] Supra 22, Principle 12; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Arts. 16(b) and 18(c) and Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Art. 8.
[173] *Supra 22,* Principle 18.
[174] Supra 169, Values 3 and 4.
[175] *Supra 22*, Principle 17.
[176] *Supra 142.*

accountability mechanisms are provided in the UN Basic Principles, according to which:

- *"A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge (17. A)*

- *Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties (18).*

- *All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct (19).*

- *Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings (20).*[177]*"*

The UN Human Rights Committee has indicated that to ensure the independence of the judiciary, States should establish an independent body that is responsible for the application of disciplinary rules.[178] The Committee has also emphasized the need to secure the independence of the judiciary through oversight and judicial discipline within the judiciary rather than through parliamentary channels.[179] The possibility of accountability mechanisms being misused to undermine judicial independence is addressed through the requirement that States take appropriate measures to ensure that these processes are not used in an abusive or arbitrary manner.[180] The former UN Special Rapporteur on independence of judges and lawyers has emphasized that while internal judicial accountability mechanisms may be appropriate to monitor judicial independence, competence and objectivity, there must be safeguards to ensure that they are not used as a means of retaliation against or to apply internal pressure on judges.[181]

## II. Domestic Law on Security of Tenure

Tenure for judges in India is constitutionally guaranteed. Tenure is fixed until an age of retirement which is 65 years for judges of the Supreme Court, 62 years for judges of the High Court and 60 years for judges of the district judiciary.[182]

The Indian Constitution, statute[183] and the jurisprudence of the Indian Supreme Court provide for the guarantee of security of tenure and criminal and civil immunity. However, they also provide for impeachment as a method of removal from office of judges, as well as an in-house disciplinary mechanism to inquire into complaints against judges. Norms of judicial conduct have largely been laid down as broad principles, through judgments of the Supreme Court, the 1997 "Restatement of values of judicial life"[184] and other efforts including the practice of disclosure of assets to reduce financial corruption.

## III. Removal or Impeachment

The Constitution, while not using the term "impeachment", provides that a Judge of the Supreme Court can be "removed from office" by the President of India, acting on a motion submitted by Parliament. A Judge can be removed from office only for "proved misbehaviour or incapacity". A rigorous procedure is prescribed for Parliament to arrive at a finding that a Judge should be removed from office, a procedure which combines the participation of the legislature and judiciary. It requires the support of a majority of elected

[177] *Supra 22.*
[178] United Nations. Human Rights Committee. Concluding Observations (Armenia) CCPR/C/ARM/CO/2, para. 21.
[179] United Nations. Human Rights Committee. Concluding Observations (Sri Lanka) CCPR/CO/79/LKA, para. 16.
[180] See Inter-American Court of Human Rights. Case of *Urrutia Laubreaux vs Chile*, para. 106; Inter-American Court of Human Rights. Case of *Reverón Trujillo vs Venezuela*, para. 108; and United Nations Human Rights Committee. General Comment No. 32, para. 19.
[181] Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Report of the Special Rapporteur on the Independence of judges and lawyers. A/HRC/26/32 (28 April 2014), para. 72.
[182] CONSTITUTION, ARTICLES 124 and 217.
[183] The Judges Inquiry Act, 1968.
[184] Supreme Court of India, *Restatement of Values of Judicial Life*, 7 May 1997.

representatives, but leaves determination of guilt to the judiciary.

An impeachment motion may be introduced in either of the two houses of Indian parliament, the Lok Sabha or the Rajya Sabha. In the Lok Sabha, it may be introduced by a notice signed by a minimum of 100 members, and in the Rajya Sabha, by a notice signed by a minimum of 50 members. The Judges Inquiry Act, 1968 supplements this with a framework requiring that once a motion of impeachment is admitted into the first house of parliament, a three-member committee, constituted by the Speaker or Chairman of the house is formed to inquire into the complaint against the Judge. This Committee comprises a Judge of the Supreme Court, a Judge of the High Court and an "distinguished jurist". Charges are framed the Committee against the Judge who is given an opportunity of defence by submitting a written statement of defence. At the conclusion of the inquiry, if the Committee arrives at a finding of misbehaviour or incapacity, it submits its report to the Speaker or Chairman of the house, who places it before the house.

Clarifying the distinct roles of the Parliament (initiating and supporting the removal) and the Committee under the Judges Inquiry Act (determining misbehaviour or incapacity), the Supreme Court in a 1995 judgment held, *"Our Constitution permits removal of the Judge only when the motion was carried out with requisite majority of both the Houses of the Parliament recommending to the President for removal. In other words, the Constitution does not permit any action by any agency other than the initiation of the action under Article 124(4) by the Parliament. In Sub- Committee on Judicial Accountability etc. etc. v. Union of India & Ors. etc. [(1991) Supp. 2 SCR, 1], this Court at page 54 held that the removal of a Judge culminating in the presentation of an address by different Houses of Parliament to the President, is committed to the Parliament alone and no initiation of any investigation is possible without the initiative being taken by the Houses themselves. At page 71 it was further held that the constitutional scheme envisages removal of a Judge on proved misbehaviour or incapacity and the conduct of the Judge was prohibited to be discussed in the Parliament by Article 121. Resultantly, discussion of the conduct of a judge or any evaluation or inferences as to its merit is not permissible elsewhere except during investigation before the Inquiry Committee constituted under the Act for this purpose."*[185]

Once the motion based on the inquiry report is supported by a majority of the total membership present in the house, it is deemed to have been adopted by that house and is sent to the other house of parliament. This second house of parliament needs to adopt and pass the motion by a majority of two-thirds of its members present for it to be successful, after which the motion of impeachment is sent to the President who passes an order for removal.[186] The process of impeachment of judges of the High Court involves the same procedure.[187]

Grounds of removal are defined as "*proved misbehaviour or incapacity*". While mirroring the language used in the UN Basic Principles, this standard is far too vague for purposes of judicial discipline, in contravention of the principle of legality, which requires clear rules which are not overbroad to ensure that those to whom the rules are directed can conform their conduct to the applicable standards. In the judicial context, this is usually achieved through the establishment of judicial codes of conduct. The Supreme Court, however, has failed to provide further clarity, noting, for instance in a 1992 judgement: "*The standards of judicial behaviour, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions is the guidelines for judicial conduct."*[188]

In 1997, a full court of the Supreme Court adopted the 'Restatement of values of judicial life,"[189] which introduces relatively objective criteria. They cover conflict of interest involving family members or friends of the judge, conflict of interest involving the judges' financial interests and issues of financial or other gain and prescribe that judges should conduct themselves in a manner befitting of the office. This includes for instance, the prescription that judges shall avoid close association with members of the bar; should not permit members of his immediate family to appear before them; shall not enter into public debate or publicly express their views on matters pending before them for judicial determination; shall not accept gifts and hospitality except from close friends and family, shall not hear any matter involving a company in which they holds shares unless he has disclosed their interest and no objection is raised, and shall not speculate in shares and stocks. Issues of bias and insulation from the executive are not addressed. It should be noted

[185] *"Resultantly, discussion of the conduct of a judge, or any evaluation or inferences as to its merit, is not permissible elsewhere except during investigation before the inquiry committee constituted under the Act for this purpose."* Supreme Court of India, C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors, 1995 SCC(5)457, Judgment of 5 September 1995.
[186] CONSTITUTION, ARTICLES 124 (4) and 124(5).
[187] CONSTITUTION, ARTICLES 217.
[188] *Supra 186.*
[189] *Supra 185*.

that these "values" are intended and have typically been used as the basis for in-house disciplinary proceedings against judges, and not as the basis for impeachment. Grounds of impeachment remain broad and indeterminate.

Impeachment proceedings have been initiated against judges in six instances,[190] none of which resulted in a successful impeachment. Justice V Ramaswami was the first judge to face impeachment proceedings for financial impropriety.[191] In 1993, a motion for his impeachment was introduced and allowed by the Lok Sabha. An inquiry committee comprising Justice P B Sawant of the Supreme Court, Justice P D Desai, Chief Justice of the High Court of Bombay, and Justice O Chinnappa Reddy, former judge of the Supreme Court was constituted, and the Judge was found guilty of eleven out of the fourteen charges specifically for "*wilful and gross misuse of office, intentional and habitual extravagance at the cost of the public exchequer, moral turpitude by using public funds for private purposes and reckless disregard of statutory rules."*[192] The impeachment motion was stalled at the penultimate stage when it failed to secure the required two-thirds majority from the Rajya Sabha.
In 2018, a notice for impeachment was introduced in the Rajya Sabha against the then-Chief Justice, Dipak Misra, for allegedly giving judicial orders in exchange for monetary benefit. However, the initiative failed to secure the necessary votes for the constitution of an inquiry committee.[193] In 2011, impeachment proceedings were initiated against two high court judges, Justice PD Dinakaran of the Sikkim High Court and Justice Soumitra Sen of the Calcutta High Court. In both instances, the motion was successfully introduced. Justice Dinakaran was charged with possessing wealth disproportionate to the known sources of his income, abuse of judicial office to pass dishonest judicial orders contrary to settled principles of law to favour a few individuals or for his own unjust enrichment at the cost of the public exchequer and the country's natural resources; constituting Benches and fixing rosters of judges to facilitate dishonest judicial decisions and making arbitrary and illegal appointments and transfers.[194]Justice Dinakaran resigned soon after the inquiry committee was constituted and charges framed and the inquiry was discontinued.[195] Justice Sen was charged with misappropriating money in his official capacity, charges which were found to be "duly proved" by the inquiry committee.[196] Justice Sen resigned after the Committee submitted its report, just as the impeachment was about to be passed by the second house of parliament.[197]

Impeachment proceedings have been initiated against judges for reasons other than financial corruption or gain as well. In 2015, 58 members of parliament submitted an impeachment motion against Justice J.B Pardiwala of the Gujarat High Court for his remarks on caste-based reservation, which is constitutionally provided and protected in India. The impeachment motion claimed were "unconstitutional in nature and amount to behaviour misconduct towards the Constitution of India that forms the ground for an impeachment."[198] While hearing a petition to quash criminal charges against protestors from the Patidar community for demanding reservation within the 'Other Backward Classes' category, Justice Pardiwala included in his order, remarks unrelated to the facts or law before him and which appeared to be his personal views on reservation: "If I am asked by anyone to name two things which have destroyed this country or rather has not allowed the country to progress in the right direction, then the same is reservation and corruption".[199] The Judge subsequently expunged these remarks from the order saying they were not "relevant or necessary", after which the impeachment was not pursued.[200] In 2017, a similar notice for impeachment was introduced against Justice C.V. Nagarjuna Reddy of the Andhra Pradesh and Telangana High Court for allegedly forcing a junior Judge from the Dalit community to remove the name of Justice Reddy's brother from a dying declaration recorded by the junior judge, and for assets disproportionate to his known sources of income.[201] In 2015, impeachment proceedings were initiated against Justice SK Gangele of the Madhya Pradesh High Court on allegations of sexual misconduct. However, the Inquiry Committee set

[190] The Hindu, "List of Judges Who Faced Impeachment Proceedings", *The Hindu*, 25 May 2017.
[191] Supreme Court of India, *Sub-Committee On Judicial...vs Union Of India And Ors*, 1992 AIR 320, Judgment of 29 October 1991.
[192] Manoj Mitta, "Defiance and irregularities mark the life and personality of Justice V.Ramaswami" *India Today*, 15 June 1993.
[193] Ashrutha Rai, "CJI Impeachment: Day 1 Arguments", *Supreme Court Observer*, 8 May 2018.
[194] J. Venkatesan, "Justice Dinakaran Faced Serious Charges", *The Hindu*, 17 November 2021, and *Supra 156.*
[195] *Ibid.*
[196] Report of the Inquiry Committee constituted under sub-section (2) of section 3 of the Judges Inquiry Act, 1968 at page 55, Rajya Sabha Secretariat, Motion for Removal of Mr. Justice Soumitra Sen, Judge, Calcutta High Court, Rajya Sabha Secretariat, 2011.
[197] PTI, "Justice Sen resigns ahead of Monday's impeachment motion", The Hindu, 1st September 2011.
[198] Press Trust of India, "58 MPs Seek Impeachment Proceedings Against Gujarat HC Judge", The Economic Times, 18 December 2015.
[199] Simran Sahni, "MP's seek impeachment proceedings against Gujarat HC Judge JB Pardiwala", LiveLaw, 18th December 2015.
[200] Mahesh Langa, "Gujarat High Court Judge removes his remarks from the Order", *The Hindu,* 19 December 2015.
[201] LiveLaw News Network, "Impeachment Motion: Five Main Allegations Against Justice CV Nagarjuna Reddy", *LiveLaw.in*, 8 December 2016.

up by the Rajya Sabha determined that the allegations were unfounded.[202]

## IV. Disciplinary Proceedings (In-House)

As discussed in detail above, in 1997, the full complement of the Supreme Court adopted the 'Restatement of Values of Judicial Life'. Two years after this, a Committee on "In-House Procedure" was constituted to devise a course of remedial action against Judges who were alleged to have breached these values, as well as other "universally accepted values of judicial life." This in-house procedure was intended to serve a dual function. The first was to preserve the independence of the judiciary by keeping the inquiry mechanism within the judiciary and the second was to provide a mechanism to address complaints against judges and thereby preserve public faith in the judiciary.[203]

The In-House Procedure covers within its scope complaints against judges for their decisions, as well as for conduct outside of their decisions. It applies to complaints against judges of the High Court, Chief Justices of High courts, and Judges of the Supreme Court. Notably, it does not specify a procedure for complaints against the Chief Justice of the Supreme Court.[204] In practice, the procedure prescribed for Judges of the Supreme Court has been adopted to inquire into a complaint against the Chief Justice of the Supreme Court, as was done when former Chief Justice of India Ranjan Gogoi was accused of sexually harassing his employee.[205] When a complaint is received, either by the Chief Justice of India, or forwarded to him by the President of India, the CJI must examine the complaint. If the complaint is found to be *"serious nature involving misconduct or impropriety"* the CJI must seek a response from the concerned Judge. On receiving such a response, if the CJI is not satisfied with the response and the CJI "is of the opinion that the matter needs a deeper probe, he would constitute a committee consisting of three Judges of the Supreme Court" to conduct an inquiry.[206]

The in-house procedure specifies that the inquiry shall be in the nature of a 'fact-finding inquiry', and categorically says that it shall not be a judicial inquiry *"involving examination and cross-examination of witnesses and representation by lawyers"*.[207] However, it does provide that the concerned Judge will be entitled to appear and make his submissions. No further procedure is laid down, except to say that "[f]or conducting the inquiry the Committee shall devise its own procedure consistent with the principles of natural justice".[208] On conclusion of this inquiry, if the Committee finds sufficient substance to the allegations and the misconduct is serious enough to warrant impeachment proceedings, the Judge concerned can be advised to resign from office or seek voluntary retirement. If the judge refuses to do so, the CJI may be advised to not allocate any further judicial work. The President and Prime Minister will be informed about the findings of the Committee, along with a copy of the report so that they can initiate proceedings for removal. If the Committee finds there is substance to the allegations, but the misconduct is not considered by them to be serious enough to warrant impeachment proceedings, the CJI may advise the Judge on the misconduct and also direct that the report be placed on record.

The In-House Procedure as a means of ensuring judicial accountability is problematic in many aspects. The substantive grounds on which an inquiry may be initiated are vague and general. No objective criteria have been laid down as to what is considered misconduct as per the In-House Procedure, or for that matter, what evidence is required to meet the threshold of their existing "sufficient substance" to prove misconduct. The procedures for the initial assessment and for the subsequent inquiry are not clearly specified. No rules have been established for how the inquiry ought to be conducted, except to say that the judge should be "heard".

Each stage of the proceedings and all aspects appear to be determined by a single person- the CJI's discretionary power. Even the decision to initiate or not initiate an inquiry after receipt of a complaint is

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[202] Ashok Kini, "Insufficient Materials to Prove Charge of Sexual Harassment Against Sitting MP High Court Judge", *LiveLaw.in*, 2 August 2015; The Leaflet, "Woman Judge Sexually Harassed by Madhya Pradesh High Court's Justice Gangele Files for Reinstatement", *The Leaflet*, 23 July 2018.
[203] "*Such a procedure would serve a dual purpose. In the first place, the allegations against a Judge would be examined by his peers and not by an outside agency and thereby the independence of the judiciary would be maintained. Secondly , the awareness that there exists a machinery for examination of complaints against a Judge would preserve the faith of the people in the independence and impartiality of the judicial process.*" Supreme Court of India, Report of the Committee on In House Procedure, page 1.
[204] *Ibi.*
[205] "Sexual Harassment and the CJI", *Supreme Court Observer* and Secretary General, Notice, Supreme Court of India, 6th May 2019.
[206] Supreme Court of India, Report of the Committee on In House Procedure, page 8.
[207] *Ibid.*
[208] *Ibid.*

within the discretion of the CJI. In 2022, the Union Law Minister told Parliament that there were more than 1,600 complaints against judges of the High Courts and Supreme Court,[209] but there exists no official information as to whether action was taken on these complaints, making it impossible to determine the efficacy of the in-house mechanism.

Another limitation of this procedure is the lack of transparency, which fails to meet international standards, according to which final decisions in disciplinary proceedings and their basis be made public.[210] Efforts to ensure transparency have been rebuffed by the Supreme Court, which has posited that *"[a] report made on such inquiry if given publicity will only lead to more harm than good to the institution as Judges would prefer to face inquiry leading to impeachment…".*[211]

The 2019 in-house disciplinary proceedings against then Chief Justice of the Supreme Court Justice Ranjan Gogoi exposed further structural flaws with the mechanism. At a preliminary level it showed that the in-house mechanism did not envisage or provide for a procedure for addressing complaints against the Chief Justice. Rather, it only addressed complaints against judges of the Supreme Court, chief justice of the High Court and judges of the High Court. In response to allegations of sexual harassment against Chief Justice Gogoi by a woman employee who reported to him, an in-house committee comprising the second senior most judge and two other judges was constituted. This Committee was constituted by the Chief Justice himself, as per the in-house mechanism. The Committee refused to disclose the procedure, if any, that it had followed, it refused to provide the woman employee with a copy of Justice Gogoi's defence statement nor did they allow her to respond to it.[212] The Committee failed to provide her with a copy of the final report or make it public.[213]

The proceedings or report of the in-house committee does not have any authority of law, which hinders its implementation or enforceability, but also limits the powers of the committee itself, in terms of its capacity to summon evidence and effectively investigate the matter. Even if the charges against the Judges are substantiated, there is no enforceable sanction, as compliance is wholly voluntary. A.P. Shah, retired Judge, who served as Chief Justice of two High Courts and the Chairperson of the Law Commission of India and is presently a Commissioner in the International Commission of Jurists, has written: *"There are many shortcomings of the in-house mechanism. The biggest of these is that there is no statutory basis for the procedure, and certainly no constitutional blessing. More importantly, it appears to have limited sanctity within the judiciary itself – no judge has agreed to resign because there was an adverse report by the committee. Soumitra Sen is a case in point, being a judge who defied the report and its advice."*[214]

## V. Legal Immunity

The 1985 Judges Protection Act provides for specific and categorical immunity to Judges, of the Supreme Court, High Court as well as district judiciary, It provides that "*no court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function."*[215]

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[209] Special Correspondent, "Over 1,600 Complaints Against Judiciary: Rijiju", *The Hindu*, 2 April 2022.
[210] UN Basic Principles on the Independence of the Judiciary provides in relation to the processing of any "charge or complaint made against a judge in his/her judicial and professional capacity" that "[t]he examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge." The purpose of this provision is to protect the reputation of the individual judge, and that of the judicial system as whole, from unwarranted damage in cases where the charge or complaint is ultimately found to have been without foundation. This principle of confidentiality (subject to waiver by the judge) necessarily applies to the initial investigation (whether criminal or disciplinary in character), as well as any preliminary procedural step aimed at determining whether the complaint or charge is sufficiently well grounded to warrant a full hearing. However, the principle of confidentiality will not necessarily automatically apply to a disciplinary hearing on the merits, where other important interests in respect of the administration of justice and the rights of the complainant must be taken into consideration. *Supra 182*, UNSRIJL, Report on guarantees of judicial independence, paras 63, 98; Bangalore Implementation Measures, article 15.7; Beijing Statement, article 28; Istanbul Declaration, Principle 15.
[211] Supreme Court of India, *Indira Jaising vs Registrar General, Supreme Court*, AIRONLINE 2003 SC 266, Judgment of 9 May 2003.
[212] "Press Release by Former Supreme Court Employee and Complainant in Sexual Harassment Against CJI", *Supreme Court Observer*, 30 April 2019.
[213] Secretary General, Supreme Court Of India, *Notice*, 6 May 2019.
[214] Retd. Justice A.P. Shah, "Judging the Judges: Need for Accountability and Transparency", Rosalind Wilson Memorial Lecture, 28 July 2019; T.R. Andhyarujina, "Disciplining the Judges", *The Hindu*, 17 December 2016.
[215] The Judges (Protection) Act, 1985.

The Indian Penal Code supplements this by protecting Judges from all acts done *"when acting judicially in the exercise of any power which is…given to him by law."*[216] This immunity, however, is not absolute, as it only ensures that proceedings cannot be initiated at the instance of an individual.[217] Essentially, no criminal or civil proceedings can be initiated against a Judge except with the approval of the High Court, Supreme Court, State government or Central government.[218]
The Supreme Court expanded this provision of immunity by prohibiting any criminal case from being registered against a judge of the High Court, Chief Justice of the High Court or a judge of the Supreme Court without the government consulting the Chief Justice of India.[219] In 2019 the Supreme Court held that this immunity or protection would not extend after retirement of a public servant, which means it extends only to acts done while the judge holds office.[220]

Critically, in India judicial immunity can be lifted at the instance of the executive, which again, undermines judicial independence. The UN Special Rapporteur on the independence of judges and lawyers has underscored that "such procedures must be legislated in great detail" and should aim at reinforcing the independence of the judiciary. Accordingly, any decision to lift immunity must not solely depend on the discretion of a body of the executive branch, as this "may expose judges to political pressure and jeopardize their independence".[221]

Indian law and jurisprudence envision the criminal prosecution of judges for financial corruption and impropriety, however there is no framework for prosecution of judges for perpetration or complicity in human rights violations. Judges, like anyone else, should be held accountable for corruption. Under article 11 the United Nations Convention Against Corruption, to which India is a party, States are obliged to take measures to combat corruption and ensure integrity of judges, consistent with principles of judicial independence. With respect to human rights violations, UN treaty bodies, including the Human Rights Committee, and the Committee against Torture have addressed the involvement of judges in violations of their respective treaties, both in decisions on individual complaints (or "communications" as they are called within the UN system), and in their periodic review of the situation in State parties.[222]

## VI. Disclosure of Assets

The salaries payable to judges of the Supreme Court and High Court must be determined by the Parliament, as provided for by the Constitution. In addition, every Judge shall be entitled to such 'privileges and allowances', leave of absence, and pension which again is to be determined by parliament.[223] Once a Judge has been appointed, "neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage".[224] Salary, pension, entitlements and vacation are further detailed by the Department of Justice of the Ministry of Law and Justice, Government of India.[225]

The Supreme Court Judges (Salaries and Conditions of Services) Act, 1958[226] and the High Court Judges (Salaries and Conditions of Services) Act, 1954[227] and rules framed thereunder, while providing for salaries and other conditions of services, do not require judges to publicly declare their assets. The practice of declaration of assets has been mandated by the Supreme Court in an effort to inject transparency in judicial functioning and act as a check against financial corruption or quid pro quo.

The 1997 Restatement of Values of Judicial Life indicates that every judge of the Supreme Court and High

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[216] Indian Penal Code,1860 Section 77, now BNS, Section 15.
[217] Code of Criminal Procedure, Section 197, now BNSS, Section 218.
[218] CONSTITUTION, ARTICLE 124(4) and 218; Supreme Court of India, *K. Veeraswami vs Union of India*, 1991 SCC(3)655, Judgment of 25 July 1991.
[219] *Ibid.*
[220] Meera Emmanuel, "No Sanction Required for Criminal Prosecution of Public Servants after Retirement, Supreme Court", *Bar and Bench*, 6 December 2019.
[221] *Supra 182*, paras 67,98.
[222] See for example Human Rights Committee, Anthony Fernando v. Sri Lanka, UN Doc CCPR/C/83/D/1189/2003 (2005), para. 9.2 (imposition by court of one year of "rigorous imprisonment" for contempt of court, on basis victim had filed repetitious motions and had once "raised his voice" in the presence of the court and refused to apologize"; Committee finds the court's "imposition of a draconian penalty without adequate explanation and without independent procedural safeguards" to have violated the right to liberty of the victim); Committee against Torture, Imed Abdelli v. Tunisia, UN Doc CAT/C/31/D/188/2001 (2003), paras 10.5-10.8 (refusal of various State officials, including judges, to respond to the victim's credible allegations of torture and requests for judicial orders and other measures to investigate and protect him against further torture).
[223] CONSTITUTION, ARTICLES 125 (1) and (2).
[224] CONSTITUTION, ARTICLE 125 (2), *Proviso.*
[225] Department of Justice, "Pay, Allowance and Pension" last updated on 24-02-2022.
[226] Supreme Court Judges (Salaries and Conditions of Services) Act, 1958.
[227] High Court Judges (Salaries and Conditions of Services) Act, 1954.

Court, including chief justices, must declare their assets/liabilities at the time of appointment and revise these at the beginning of each year.[228] More than a decade later, the full bench of the Supreme Court resolved in 2009 to disclose assets on the court website. The full bench however decided that the declaration would was voluntary.[229] Presently, the websites of the Supreme Court[230] and some High courts, like the Delhi High Court,[231] contain a standard form reflecting the disclosed assets of some sitting and former judges of these courts. Even within these Court's not all judges have declared their assets in this manner, and the practice of declaration of assets remains voluntary and is not mandated by law.

Civil society efforts to make disclosure mandatory have not been successful. In 2019 the Supreme Court disagreed with an order of the Central Information Commission and Delhi High court making it mandatory for Judges to disclose assets-related information, relying on its position on in-house proceedings, that disclosure would adversely impact the functioning of the judiciary.[232] In August 2023, a Parliamentary Standing Committee report titled 'Judicial Processes and their Reform', recommended the government bring about appropriate legislation to make it mandatory for judges of the higher judiciary (the Supreme Court and the High Courts) to furnish their property returns on an annual basis to the appropriate authority.[233] As recently as February 2024, the Union government expressed its intention to make it mandatory for judges to disclose their assets under the High Court Judges Act, 1954, and the Supreme Court Judges Act, 1958.[234] As of October 2024, no steps have been taken to implement this into law.

## VII. Contempt of Court

The Constitution of India and the Contempt of Courts Act of 1971 empowers the Supreme Court and High Courts to declare contempt of court and order sanctions in response. The Courts have authority in respect of civil contempt, or the deliberate and wilful flouting of orders or directions of the Court. They also have the broader power to declare and act on criminal contempt, which is identified as the publication of any matter or the doing of any act which:

> *(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or*
> *(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or*
> *(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;*[235]

These powers are notionally founded on the need to protect the authority of the judiciary, while at the same time vesting these powers with the judiciary itself in an effort towards judicial insulation. The executive's role is limited to the extent that when a private complaint of contempt is filed, the consent of the Attorney General, the government's law officer, is required before it can be heard by the Court.

The manner in which contempt powers have been deployed in India have served to effectively impede efforts at enforcing judicial accountability. Typically, contempt powers are used against allegations of corruption or bias against judges. The power to initiate contempt proceedings and the power to punish have been selectively and arbitrarily invoked, having a chilling effect on public debate and criticism of judgments of the Supreme Court or the manner of judicial functioning.[236] In 2001 'Wah India' magazine was charged with contempt by the Delhi High Court when it published an anonymous survey of 50 senior advocates who rated sitting judges performance on various parameters, including their judicial knowledge, reputation of personal integrity etc.[237] In August 2020, the Supreme Court convicted lawyer Prashant Bhushan on contempt charges for two tweets, one which posted a photograph of the then Chief Justice riding a

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[228] *"Resolved further that every Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or any person dependent on him/her) within a reasonable time of assuming office and in the case of sitting Judges within a reasonable time of adoption of this Resolution and thereafter whenever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time." Supra 185.*
[229] Abraham Thomas, "Govt Looks to Make it Mandatory for Judges to Declare Assets", *Hindustan Times*, 8 February 2024.
[230] Supreme Court of India, *Assets of Judges*, No date.
[231] High Court of Delhi, *Declaration of Assets*, No date.
[232] *"Deliberations during 'in house procedure' evolved as a result of the resolution of the Chief Justices Conference in 1999 and cannot be disclosed*." Supreme Court of India, Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, Crl. Appeal No. 10044/2010, judgment dated 4 March 2020.
[233] Soibam Rocky Singh, "Only 13 of 42 Delhi High Court Judges Have Declared Their Assets", *The Hindu*, 21 January 2024.
[234] Bhavya Singh, "Union Government Planning Rules For Annual Declaration Of Assets By Judges", *LiveLaw.in*, 8 February 2024.
[235] Contempt of Courts Act, 1971, Section 2.
[236] Harsh Bora, Part III Action Research & Resource Centre, *The Judicial Power of Contempt*, (2023).
[237] High Court of Delhi, *Shri Surya Prakash Khatri & ANR. v Smt. Madhu Trehan and Ors,* 2001 CRILJ 3476, Judgment of 28 May 2001.

motorcycle, purportedly owned by a BJP politician, and another which criticized the Supreme Court for failing to hear matters concerning fundamental rights during the Covid-19 pandemic.[238]

While contempt powers are sometimes justified on the grounds that they serve as a judicial protection to advance independence, the arbitrary and selective use in India has often had the effect of deterring judicial accountability and insulating the judiciary. It also has the effect of unduly limiting and inhibiting the exercise of freedom of expression, particularly concerning judicial administration and functioning.

**Conclusion: Judicial Accountability**

A web of protections such as immunity from civil and criminal proceedings, the power to take action against contempt of individual judges or the judiciary and rigorous and multi-layered procedures to initiate removal or impeachment have evolved to protect judiciary from circumstances that may prevent judicial independence. Constitutional guarantees like the security of tenure until a predetermined retirement age, and protections against alteration of terms of service, including salary and privileges during the Judges tenure are provided for India. However, judicial accountability mechanisms do not meet international law standards.

Consistent with underlying principle, supported by international law and standards, that the political branches of government should be not have effective control or supervision over the judiciary, the ICJ considers it an impeachment or removal process of judges by parliament generally to be an inappropriate exercise of legislative authorities. Parliamentary impeachment processes originated in part as an attempt to limit arbitrary executive discretion in dismissing judges. However, many of these same standards also recognize that, today, the political character of Parliamentary bodies itself creates a risk of abuse, and that other mechanisms, such as independent judicial councils or disciplinary tribunals, should exercise such functions so as to effectively safeguard judicial independence. There is a certain theoretical dissonance to the idea that elected political bodies could be capable of acting as an "independent and impartial tribunal" in judging judges, and the real-world track record of such proceedings bears out the concerns in practice.[239] Further, even if a particular country has no recent history of abuse by Parliament of such powers, the political situation can change rapidly and future parliamentarians may be more willing to exercise the powers for ulterior motives or in an unfair fashion.

The Beijing Statement articulates the concern with parliamentary procedures being used to remove judges; that procedure is unsuitable; it is not appropriate for dealing with some grounds for removal; it is rarely, if ever, used; and its use other than for the most serious of reasons is apt to lead to misuse.[240] In India, the only constitutionally specified grounds of impeachment is "proved misbehaviour or incapacity", which fails to serve as an established standard of judicial conduct that is required under the Beijing Statement to guide and guardrail the removal of judges.[241] The fact that impeachment is rarely used in India and the absence of successful cases of impeachment further points to a systemic gap in judicial accountability in India.

The alternate method in the form of the 'In-house procedure' while ensuring judicial insulation, does not meet international law standards in other aspects. The mechanism is guided only by a code of judicial values[242] and not by a code of judicial conduct consistent with the UN Basic Principles which require that *"All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct".*[243] The in-house mechanism has been developed by the Supreme Court and is not backed by statute or the constitution, thus making it impermeable to judicial review and to implementation and monitoring. The mechanism functions in an opaque manner, contrary to the Beijing Statements requirement of transparency, including requiring publication of reports of disciplinary proceedings.

[238] Supreme Court of India, *In Re: Prashant Bhushan and Anr*, AIR 2020 SC 4114, Judgment of 14 August 2020.
[239] See for example, ICJ, "Sri Lanka: judges around the world condemn impeachment of Chief Justice Dr Shirani Bandaranayake" (23 January 2013); ICJ "Ukraine: dismissal and criminal prosecution of judges undermine independence of the judiciary" (20 March 2014).
[240] *Supra 44,* principle 23.
[241] *Supra 44*, principle 27.
[242] *Supra 185*.
[243] *Supra 22,* principle 27.

## Part E: Post-Retirement Employment

### I. Post-retirement Employment of Judges under Indian Law

The Constitution prohibits a retired judge of the Supreme Court from practising before any Court or authority in India.[244] Judges retired from High Courts are prohibited from practising before any High Court, but may practise before the Supreme Court of India.[245] There exists no other explicit prohibition or restriction on post-retirement postings. To the contrary, there exist constitutional and statutory requirements that the National Human Rights Commission, National Company Law Tribunal, National Green Tribunal, and other ad-hoc tribunals and adjudicatory bodies and commissions of inquiry be headed by and/composed of retired judges. An overwhelming majority of arbitrators are drawn from retired judges as a matter of practice, although there is no legal requirement that arbitrators need to have held a judicial position.[246] A 2016 Report by the Vidhi Centre for Legal Policy showed that of all the positions held by judges post-retirement, 56% were required by statute, which means that law requires that only judges who have retired or relinquished their post can be appointed to these positions (typically as chairperson or member of tribunals and other quasi-judicial bodies).[247]

A Petition seeking a prohibition on post-retirement employment has been dismissed by the Supreme Court as recently as in 2023, with the Court observing that it "*has to be left to the conscience of the Judge concerned.*[248] The Petition argued that the practice of judges being appointed to 'political positions' post-retirement should be regulated to prevent a misconception being formed in the minds of the people that a judge accepting any post-retirement sinecure from the government was biased in his decisions during his judicial tenure. It sought the Supreme Court institute the requirement of a two-year "cooling off" period before Judges could accept political postings.[249]

Viewed within this context, post-retirement employment of judges ought to be assessed through two filters. The first about whether the appointment is statutorily required, and the second about who makes the appointment. Work that a Judge may perform post-retirement, whether it is practising as a lawyer or as an arbitrator, roles in which the Judge is not under the control and supervision of the executive, does not undermine judicial independence. In fact, judges, like all people, are generally entitled to the right to work, as protected under article 6 of the International Covenant on Civil and Political Rights. A recently retired Judge of the Supreme Court, Justice Hemant Gupta, said: *"Having worked for 42 years with the judiciary, I cannot do anything else but work relating to judicial determination."*[250]

The right to work however is not absolute and in the context of the judiciary, needs to be balanced with judicial independence. Restrictions on post-retirement employment of the kind that seek to preserve judicial independence and accountability, particularly, to safeguard against prospective inducements that could impact a judge's conduct or decision making while on the bench. Considering the different forms of post-retirement employment in India, there cannot be a blanket prohibition, and restrictions that are best suited to the form of employment/role need to be developed.

If the appointment is statutorily required, it cannot be prohibited. However, if these appointments are made at the discretion of the executive, there remains a need to minimise executive discretion. Apart from statutorily required posts, Judges may take up employment with the private sector, they may serve on the board of listed companies, and they may serve as arbitrators between private parties. In such situations, any potential conflict of interest can be raised and objected to by shareholders or opposing parties in commercial disputes. The last category of employment is with the government, but which are not statutorily required. In India, Judges have been appointed as Governors of States and as members of the Rajya Sabha, at the behest of the ruling party. This category poses a direct risk to judicial independence and impartiality. This risk was articulated by the Law Commission of India in a 1958 Report, arguing that, "The Government is a party in a large number of causes [cases] in the highest Court and the average citizen may well get the impression, that a judge who might look forward to being employed by the Government after his retirement,

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[244] CONSTITUTION, ARTICLE 124(7).
[245] CONSTITUTION, ARTICLE 220.
[246] Divya A., "Retired Judges Control Arbitration with a Tight Fist, Need Reform: V-P Jagdeep Dhankhar", *The Indian Express*, 3 December 2023.
[247] Vidhi Centre for Legal Policy, *Law in Numbers*, Vidhi Centre for Legal Policy (2016).
[248] Supreme Court of India, Bombay Lawyers Association vs Union of India, 2023 LiveLaw (SC) 753, Order of 6 September 2023.
[249] Awstika Das, "Supreme Court dismisses PIL seeking 2 years cooling off period for retired judges post retirement appointments", *LiveLaw,* 6 September 2023.
[250] Debayan Roy, "If Asking a Question is an Indication of the Court's Mind, Good Luck to the Lawyers: Justice Hemant Gupta", *Bar and Bench*, 18 October 2022.

does not bring to bear on his work that detachment of outlook which is expected of a judge in cases in which Government is a party."[251]

Yet another category is that of retired judges joining political parties, which while permissible within the framework of right to freedom of expression and association that Judges enjoy, also engenders an obvious conflict of interest.

While looking at post-retirement employment of judges, it is relevant to understand the linkages with the pension structure provided for judges in India. The retirement age is 62 for judges of the High Court and 65 for Judges of the Supreme Court.[252] After retirement, judges are entitled to a pension for the remainder of their lives,[253] which, while providing a basic level of financial security is likely to be well below what a retired judge can otherwise earn.[254]

## II. Recent Instances of Post-Retirement Employment of Judges

In recent years there has been a spate of appointments of former Judges of the Supreme Court to positions by the executive. Data shows that 21 percent of Judges who retired between 2018 and 2023 took up official posts (offered by the executive).[255] For instance, Justice Adarsh Kumar Goel retired from the Supreme court on 6 July 2018 and was appointed as Chairperson of the National Green Tribunal by the Central government[256] with effect from that date. Justice Arun Mishra retired from the Supreme Court in September 2020 and was appointed by the Central government as Chairperson of the National Human Rights Commission the following year.[257] Justice Ashok Bhushan retired from the Supreme Court on in July 2021 and was appointed by the Central government as Chairperson of the National Company Law Tribunal[258] in November 2021. Each of these bodies have jurisdiction over matters significant to human rights and rule of law, including the power to hold the government and officials accountable. Considering other judges retired during the same period there is no reasoning or publicly available criteria on the basis of which these particular judges were chosen to head these tribunals. By being able to pick and choose judges who head these bodies, the executive may be prone to the actual or perceived undue influence over the discharge of functions by them. No rule of seniority or any other predetermined criteria exists to determine which retired judge can or should be appointed to particular statutory bodies. Appointments remain within the sole discretion of the executive. Commissions of Inquiry too are statutorily required to be headed and composed of judges, and can be constituted either by the High Court or Supreme Court or by the State or Union government. Judicial appointments there are selected in a discretionary manner. Typically, these Commissions are constituted to inquire into a specific incident of rights violation.[259]

The most problematic category of post-retirement employment of judges are those which are not statutorily required, but are appointments made by the executive, to roles that form part of the executive or the government. For instance, a retired judge being appointed by the Union government as the Governor of an opposition-ruled State, or being nominated as a member of parliament. In 2014, Retired Chief Justice Sathasivam was upon retirement appointed as Governor of Kerala, a State ruled by the opposition Indian National Congress at the time.[260] The opposition Congress Party alleged that the appointment was made in return for orders favourable to the then BJP President and current Home Minister with regard to his alleged involvement in extra-judicial killings.[261] Justice Abdul Nazeer retired from the Supreme Court in January

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[251] Law Commission of India, "Report on Reform of Judicial Administration", 1958.
[252] CONSTITUTION, ARTICLE 124.
[253] As of 2016, a pension of INR 15 lakhs to INR 16.8 lakhs per annum is paid to judges and the chief justice, respectively, of the Supreme Court. Additionally, judges of the Supreme Court are entitled to a death-cum-retirement gratuity payment of up to INR 20 lakhs as well as a few lakhs per annum towards expenses incurred for staff. High Court judges are entitled to a pension of INR 13.5 lakhs and the Chief Justice to INR 15 lakhs. *"Pension is disbursed by the law ministry under the union or state government. For judges of the Supreme court, the pay and accounts office of the Supreme Court sends the pension report to the Department of Justice for sanctioning the pension. For judges of the High court, the accountant general of the state sanctions the pension on receipt of the report of retirement and pension paper of the judge from the registry of the Court."* Department of Justice, Annexure: 'Statement Showing Retirement Benefits to Judges of the Supreme Court and High Court.
[254] Arghya Sengupta, "After the Judges Retire: Time for a Fresh Look at Sensitive Judicial Afternoons and Evenings", *Times of India*, 7 May 2019.
[255] Debayan Roy, "21% of Supreme Court Judges Who Retired in the Last 5 Years Took Up Post-retirement Posts", *Bar and Bench*, 11 June 2023.
[256] The National Green Tribunal Act, 2010.
[257] The Protection of Human Rights Act, 1993.
[258] Ministry of Corporate Affairs, *Notification*, 21 July 2016.
[259] The Commissions of Inquiry Act, 1952.
[260] ET Bureau, "Government appoints former CJI P Sathasivam as Governor of Kerala", *The Economics Times*, 4 September 2014.
[261] Deepshikha Ghosh, "Ex-Chief Justice as Governor? 'Which Verdict Pleased Modi, Amit Shah?', Asks Congress", *NDTV*, 2

2023 and a month later was appointed as Governor of Andhra Pradesh, again ruled by the YSRCP government, not allied with the BJP. In 1998 former Chief Justice Ranganath Misra was nominated to the Rajya Sabha by the Congress government. Retd. Justice Ranganath Misra had earlier headed a Commission of Inquiry absolving the Congress party leaders of any role in the 1984 anti-Sikh violence.[262] More recently a retired Chief Justice of India, Justice Ranjan Gogoi was nominated to the Rajya Sabha by the BJP government months after he retired in November 2019, giving rise to allegations of quid pro quo for his judgments in the Rafale case, NRC case and Ayodhya case which suited the BJP government.[263] In March 2024 on the eve of national elections, Justice Abhijit Gangopadhya of the Calcutta High Court stepped down and formally joined the BJP and was immediately given authorization to contest for parliamentary elections.[264]

As is evident from the above illustrative list, while 'political appointments' of judge's post- retirement have been made through different governments, the BJP government has in the past decade made a greater proportion in a shorter span of time, attracting allegations of quid pro quo. Former Judges including Retd. Justice A.P. Shah[265] and Justice Deepak Gupta have publicly criticized the post-retirement postings of judges, even calling them 'post-retirement benefits'. Former Supreme Court Judge Deepak Gupta argued that *"[t]here should not be any post-retirement benefits. We cannot have an independent judiciary with such benefits."*[266] There have been other judges of the Supreme Court including former Chief Justices JS Kehar, RM Lodha and SH Kapadia, and former Justices J Chelameswar and Kurian Joseph amongst others who have made public their decision to not accept any post-retirement employment from the executive.[267]

A decade ago, retired Justice A.P. Shah, in his capacity as chairperson of the Law Commission of India recommended a "cooling off' period off three years before judges became eligible to take up any employment or work post-retirement with the Government.[268] Former Chief Justice of India, Justice Lodha too had proposed an alternative to the present arbitrary practise of post-retirement employment of judges. He proposed that all judges of the Supreme Court and High Court should be given an option prior to retirement, of choosing to receive their full salary for an additional ten years after retirement, or receive the pension as detailed above. Only those judges who chose the full salary option would be entitled to be empanelled for selection of posts that by law require retired judges, and these judges would not be allowed to take up any other posts or private work including arbitration

**Conclusion: Post-retirement Employment**

Indian law contains no Constitutional or other prohibition on post-retirement employment of Judges, except to the extent that Judges of the Supreme Court cannot practise as advocates before the Supreme Court.

Typically, post-retirement, judges engage themselves in private arbitration, mediation and also accept roles within public and statutory bodies from the executive. Judges accept post-retirement employment from the executive, both within the executive, as Governor of a State or a Member of Parliament as well as in the role of a member of a Statutory body or tribunal. Both these categories of post-retirement employment raise concerns about judicial independence and impartiality. With regard to the first category, there is a direct assumption of quid pro quo, and the act of accepting post-retirement positions within the executive casts a shadow on all judgments and the conduct of the judge while in office. It also serves as a signal to sitting judges that they may be suitably rewarded if they issue favourable decisions. In the second category, a prohibitive approach is impossible since statutory bodies, tribunal and commissions require and benefit from being composed of judges However, the arbitrariness and lack of any organized system to select judges for these bodies, allows for executive discretion which serves to reward the judges for their conduct as well as

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September 2014.

[262] Ministry of Home Affairs, *Report of Justice Ranganath Misra Commission of Inquiry*, Volume I.

[263] Liz Mathew; Apurva Vishwanath, "Ex-CJI Ranjan Gogoi's Post-retirement Benefit Courtesy Govt: Rajya Sabha Seat", *The Indian Express*, 17 March 2020; Apoorva Mandhani, "Ayodhya, Rafale and More – 5 Big Ranjan Gogoi Verdicts That 'Worked in Favour of Modi Govt'", *The Print*, 17 March 2020.

[264] Santanu Chowdhury, "Abhijit Gangopadhyay Formally Joins BJP: 'Prime Objective is to Remove Corrupt Bengal Govt'", *The Indian Express*, 8 March 2024.

[265] A.P. Shah, "Post-retirement Appointments: A Danger to Judicial Independence", *The Hindu*, 16 February 2023.

[266] Sohini Chowdhury, "We Can't Have Independent Judiciary If Judges Look For Post-Retirement Appointments: Ex-SC Judge Deepak Gupta", *LiveLaw.in*, 19 February 2023.

[267] Debayan Roy, "21% of Supreme Court Judges Who Retired in the Last 5 Years Took Up Post-retirement Posts", *Bar and Bench*, 11 June 2023.

[268] Apoorva Mandhani, "Law Commission Recommends Fixed Tenure for CJI, Uniform Retirement Age of 65 for SC and HC Judges and Cooling-off Period After Retirement", *LiveLaw.in*, 30 July 2014; Krishnadas Rajagopal, "Law Commission recommends fixed tenure for CJI", The Hindu, 30 July 2014.

to protect the executive. An additional consideration is that a retired Judge appointed to a position within the government, may use the influence gathered while serving as a Judge with improper motive in his post-retirement position.

International standards do not directly address the question of post-retirement employment, but, like any other actions or practices which could pose a risk to independence and impartiality while in office, they may be subject to some degree of restriction and regulation. Certain types of post-retirement employment of judges could give rise to inferences or perceptions that there may have been bias in adjudication, including the possibility of individual bias towards the executive while in office. Post-retirement employment serves as a potential reward for decisions, which in turn functions as external and undue influence on Judges.

Judges, like any other person, enjoy the full range of human rights, the right to freedom of expression, belief, association and assembly, as well as the right to work in their chosen area.[269] Any restrictions on these rights must be necessary and proportionate for purpose of maintaining a fair administration of justice as part of public order. In the context of notable instances in India where the post-retirement employment, position or conduct of a Judge has given rise to actual or perceived bias and had the effect of undermining independence and impartiality as well as the credibility of specific judgments, restrictions on employment, if narrowly tailored, may well meet this test.

Retired Justice A.P. Shah has written that, *"There needs to be a demarcation between roles where the presence of a judicial authority is clearly valuable and even necessary, such as in a tribunal or a commission, and where it is not… judges should not take up any appointments upon retirement stemming from political patronage (with the nature of such appointments being clearly defined). Additionally, a cooling period of about two years should be considered a mandatory minimum before a judge agrees to take on any post-retirement adjudicatory role, in any case."*[270]

[269] *Supra 169,* Value 4.6
[270] *Supra 267.*

## Part F: Judicial Administration Pertaining to Listing and Allocation of Cases in the Supreme Court of India

### I. Applicable International Law and Standards

The internal administration of the judiciary must be left within the purview of the judiciary and there should be no external influence, including from the political branches. One aspect of internal administration is that the allocation of cases must follow pre-established criteria in order to safeguard the right to an independent and impartial judge and consequently, the right to a fair trial. According to the Beijing Principles, *"[t]he assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court."*[271] There is good practice to this effect in many national jurisdictions and regional systems.[272]

### II. Constitutional Basis and Legal framework

The Constitution of India vests the Supreme Court power to make rules for its internal administration and to regulate "the practice and procedure of the Court," which includes *"rules as to procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered."*[273] Accordingly, the Supreme Court has established a number of rules and procedures. These include the Supreme Court Rules of 1966,[274] subsequently replaced by the Supreme Court Rules of 2013;[275] the Handbook on Practise and Procedure and Office Procedure of 2017;[276] the Manual of Office Procedure on Judicial Side;[277] and the Supreme Court Officers and Servants (Conditions of Service and Conduct) Rules, 1961.[278] All of these instruments govern the internal administration of the Court.

Listing and allocation of cases in particular is governed by the Supreme Court Rules of 2013 and the Handbook on Practice and Procedure and Office Procedure of 2017. Listing and allocation of cases is governed by a two layered framework. The procedures require that the Chief Justice prepares lists of all matters pending before the Supreme Court and categorize them according to when they will be heard. These lists includes a 'terminal list' of all cases ready to be heard in the year,[279] a 'weekly list' of all cases to be heard within following week, and a 'daily list' of all cases to be heard the following day[280] The manner in which these list is to be prepared is specified in a separate chapters of the Handbook entitled 'Roster'[281] and 'Listing of Cases'[282] The Roster, also prepared by the Chief Justice, contains instructions as to the methodology of allocation, time frame within which cases should be listed, categorization of cases, and which categories of cases will be listed before which judges.[283] Subject to the Roster, final allocation of cases is to be done *"as per subject category through automatic computer allocation".*[284] A practice has developed where each Chief Justice devises their own Roster. For instance in 2017, the then Chief Justice had introduced a new scheme for the automated listing of cases which categorizes cases and specifies the manner in which they should be allocated.[285]The Supreme Court in its judicial capacity has held that cases can be assigned only in accordance with the designations provided in the roster and all judges are bound by the Roster.[286] The Chief Justice also determines whether a matter is to be heard by a bench of two judges, three judges[287] or whether the matter involves an important question of law or interpretation of the

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[271] *Supra 44,* Principle 35.
[272] The European Network of Councils for the Judiciary, for example, has set forth minimum standards for the allocation of cases in a manner that they are compatible with the right to fair trial. European Network of Councils for the Judiciary, Minimum Judicial Standards IV: Allocation of Cases, ENCJ Report 2013-14.
[273] CONSTITUTION, ARTICLE 145.
[274] Supreme Court of India, *The Supreme Court Rules, 1966*.
[275] Supreme Court of India, *The Supreme Court Rules, 2013*.
[276] Supreme Court of India, *Handbook on Practise and Procedure and Office Procedure*, 2017.
[277] Supreme Court of India, *Manual of Office Procedure on Judicial Side*, 2007
[278] Supreme Court of India, *Supreme Court Officers and Servants (Conditions of Service and Conduct) Rules*, 1961.
[279] *Supra 278,* Chapter V: 'Powers, Duties and Functions of the Registrar', Rule 3.
[280] *Supra 278,* Chapter V: 'Powers, Duties and Functions of the Registrar', Rule 4.
[281] *Supra 278,* Chapter VI: 'Roster'.
[282] *Supra 278*, Chapter XIII: 'Listing of Cases'.
[283] *Supra 277*, Order 3, Rule 2 and Supra 230, Chapter VI: 'Roster', para. 1.
For an example of a Roster, see *Roster of the Work for Fresh Cases, Notified Under the Order of Hon'ble the Chief Justice of India*, 2 January 2024.
[284] Supra 278, Chapter XIII: 'Listing of Cases', 'Cases, Coram and Listing', para. 2.
[285] Supreme Court of India, *An Overview of the New Scheme for Automated Listing of Cases*, No date.
[286] Supreme Court of India, Directorate of Enforcement & ANR vs Bablu Sonkar & ANR, Special Leave Petition (CRL.) No. 16226 of 2023, Judgment of 9 February 2024.
[287] *Supra 277*, Order VI.

Constitution, necessitating a 'constitutional bench' comprising five or more judges.[288] The Chief Justice further selects judges who shall be part of the Constitutional bench, a significant power considering judgments of Constitutional benches decide substantial questions of law and fundamental rights.

In addition to these detailed instructions, the Handbook also provides a residual, discretionary power to the Chief Justice to "*allocate, assign any appeal, cause of matter to any Judge or Judges of the Court."*[289] This discretionary power gives rise to the possibility of arbitrariness, irregularity, unpredictability and actual or perceived improper or ill-motivated practices in allocation of cases. Over the past decade (further detailed later), there have been numerous instances of "irregular listings" which may range from listing a particular case immediately while delaying the hearing of another case in the same category; listing of certain cases before certain judges in contravention of the method prescribed in the roster; and re-allocation of cases from a particular bench to another bench without providing any reasons. The methodology of allocation does not appear to be based on objective principles and criteria including the nature and complexity of the case, the competence, experience and specialisation of the Judge, the availability and workload of the judge and public perception of the independence and impartiality of the allocation.

## III. Irregular Listing and Allocation of Cases

In recent years, the irregular, and effectively arbitrary listing and allocation of cases has been the subject of controversy and central to debates on judicial independence. The purported arbitrary exercise of the powers of the then Chief Justice triggered the first ever press conference held by four sitting judges of the Supreme Court in 2018, Judges Jasti Chelameswar, Ranjan Gogoi, Kurien Joseph and Madan Lokur. During the event, they presented an open letter to the then Chief Justice, Dipak Misra, pointing out that cases were being listed in a departure from well-established rules and practices. The Letter states: "*There have been instances where cases having far-reaching consequences for the nation and the institution had been assigned by the Chief Justice of this Court selectively to the Benches "of their preferences'' without any rational basis for such assignment".*[290] Amongst other instances, Chief Justice Dipak Misra listed a petition seeking investigation into the death of district Judge Loya before himself, a move which prompted the four senior-most judges of the Supreme Court to hold a press conference and denounce the allegedly arbitrary exercise of the Chief Justice's power.[291] A month after the press conference, the Judges Roster was made public by CJI Misra.[292]

Through the past decade, several politically sensitive cases have in fact been assigned and allocated in a manner that deviates from established rules and procedures as well as from the roster. During the tenure of Chief Justice Kehar, Chief Justice Dipak Misra, and Chief Justice Gogoi, matters pertaining to allegations of corruption against the first two and sexual harassment against Justice Gogoi were either heard by them or assigned to select benches, bypassing the ordinary rules and practices relating to allocation.

Former High Court Chief Justice and ICJ Commissioner A.P. Shah has pointed out that there is a pattern to certain cases being listed before certain judges, and that these *"reliable" judges not only ensure that the pro-executive nature of the Court is sustained, but also serve to protect the CJI in times of crises.*[293] A 2023 analysis shows how eight cases where the Petitioners were either opposition politicians or human rights defenders seeking bail and challenging criminal charges against them, were all listed before Justice Bela Trivedi. The analysis argues that this listing is in contravention of both the seniority norm as well as the bar against re-allocation of cases. [294] It also points out that Justice Trivedi served as Law Secretary in the government of Narendra Modi while he was Chief Minister of Gujarat.[295]

In December 2023, a case listed before Justice Sanjay Kishan Kaul was subsequently listed before another bench, in breach of the rule which requires cases being heard by a judge to be listed only before that judge. When the case was found to be removed from his Court, Justice Kaul himself remarked, *"I clarify that it is not that I have deleted the matter or that I am unwilling to take the matter, both,"* and also said, *"I am sure*

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[288] CONSTITUTION, ARTICLE 145 (3).
[289] *Supra 278,* Chapter XIII: 'Listing of Cases', 'Cases, Coram and Listing', para. 47, note 3.
[290] "Read the full text of the letter submitted by four Supreme Court Judges to the CJI", *The Hindu*, 4 December 2011.
[291] The Wire, "Loya Case the Tipping Point, Four SC Judges Say Democracy Is in Danger", *The Wire*, 12 January 2018.
[292] Sudhir Krishnaswamy and Advay Vora, "Master of the Roster: Securing Process Legitimacy of the Supreme Court", *SCC Observer,* 13 September 2024.
[293] Ajit Prakash Shah, "Court's Drift and Chinks in the Judiciary's Armour", *The Hindu*, 7 September 2020.
[294] Saurav Das, "Contrary To SC's Rules Of Assignment, At Least 8 Politically Sensitive Cases Moved To One Judge In 4 Months" *Article 14,* 7 December 2023.
[295] Supreme Court of India, Profile of *Justice Bela M. Trivedi*, No date.

*the Chief Justice is aware of it…Yesterday I found it was deleted. I checked up"*. [296] This instance best exemplifies the discretionary power of the Chief Justice and how it may be used to contravene established practices of listing and allocation of cases. Ironically the case being heard by Justice Kaul related to the Union government's delay in selection and appointment of judges.

Discerning the motives for the arbitrary and irregular listing of cases can be difficult and may require a deeply intricate and contextual exercise to decisively substantiate. However, concerns about irregular listings have been the subject of Petitions filed before the Supreme Court have also been expressed by a series of former judges and senior advocates who allege that these matters are being listed before certain benches to secure outcomes favourable to the executive.

In December 2023, Senior Advocate Dushyant Dave who has repeatedly drawn attention irregularities in listings wrote an open letter to the Chief Justice of India where he expressed concern about the exercise of the Chief Justices discretionary power:

*"...I have personally come across a number of cases listed before various Hon'ble Benches upon first listing and/or in which notice have been issued, being taken away from those Hon'ble Benches and listed before other Hon'ble Benches. Despite first coram being available the matters are being listed before a Hon'ble Bench in which second coram presides. Matters listed before Court No. 2, 4, 6, 7, amongst others have been shifted out and listed before other Hon'ble Benches in clear disregard of the Rules, the Handbook on Practise and Office Procedures referred above and established Practise and Convention. Curiously, the Seniority of the first coram is also being ignored in doing so… It would not be out of place to mention that these matters include some sensitive matters involving human rights, Freedom of Speech, Democracy and Functioning of Statutory and Constitutional Institutions."*[297]

Irregular listings in the discretionary power of the Chief Justice are often exercised without consulting other judges of the Supreme Court. In that connection, petitions have been filed in the Supreme Court seeking clarification on the administrative authority of the Chief Justice of India as the Master of Roster and seeking the laying down of procedure and principles to be followed in preparing the roster for allocation of cases.[298] The Supreme Court has rejected efforts to introduce further clarity and objectivity into the manner in which the Chief's Justice's administrative powers of listing and allocation should be exercised. The Court reiterated that *"the Chief Justice is the master of the roster and he alone has the prerogative to constitute the Benches of the Court and allocate cases to the Benches so constituted."* [299]

**Conclusion: Judicial Administration pertaining to Listing and Allocation of Cases**

The Indian system of listing and allocation of cases complies with international law and standards to the extent that it comprises pre-determined and written criteria to guide the listing and allocation of cases. However, the residual discretionary power vested with the Chief Justice of the Supreme Court and Chief Justice of the High Court's allows arbitrariness and selective listing of cases. Instances of irregular and selective listing of politically sensitive cases, or cases that have significant implications for the executive and the ruling party have been documented in India. Departure from the established rules and procedures of listing of cases have been excluded from judicial review, and there exists no other checks or balances on the Chief Justice's discretionary power. The practice of judicial administration pertaining to listing and allocation of cases undermines international law and standards on ensuring internal and external independence and ensuring circumstances for judicial impartiality.

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[296] The Indian Express, "Some Things Best Left Unsaid: SC on Petitions Not Listed for Hearing", The *Indian Express*, 6 December 2023.
[297] Dushyant Dave, Senior Advocate, Supreme Court of India, "Letter to the Hon'ble Chief Justice of India, Supreme Court of India", 6 December 2023; Dushyant Dave, "An opaque justice", *The Indian Express*, 12 January 2018.
[298] Supreme Court of India, *Shanti Bhushan vs Supreme Court of India*, Writ Petition (Civil) No. 789 of 2018, Judgment of 6 July 2018.
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## Recommendations

1. **Selection and Appointment of Judges and Transfer of Judges:**

    a. The Government of India [and Parliament], pursuant to the advice, guidance and approval of the Supreme Court of India, should enact a statute providing for and setting the procedural and substantive terms for the establishment and constitution of a Judicial Council. The statute should provide that the membership of the Council will be constituted of a majority of judges responsible for selection, career progression and transfer of judges. The procedural and substantive terms should be consistent with international law and standards on the independence of the judiciary, including the UN Basic principles and the Beijing principles. There should be gender parity in its membership, which should also reflect the demographic pluralism of India, including the scheduled castes, scheduled tribes communities and religious minorities.

    b. In formulating the terms of the statute, the Government should establish a consultative process including with representatives of the legal profession, with a view to producing and adopting fixed criteria which meet international law and standards and which would form the sole basis for selection of Judges to the Supreme Court and High Court; the elevation of Judges from the High Court to the Supreme Court; and the transfer of judges between High Courts. These criteria and best practices and should be made publicly available.

    c. Pending the enactment of a statute constituting a judicial council for selection of judges, the Government of India, pursuant to the advice, guidance and with the approval of the Supreme Court of India, and following a consultative process including with representatives of the legal profession, should formulate and adopt fixed criteria which meet international law and standards and which would form the sole basis for selection of Judges to the Supreme Court and High Court; the elevation of Judges from the High Court to the Supreme Court; and the transfer of judges between High Courts. These criteria and best practices and should be made publicly available.

2. **Judicial Accountability:**

    a. The Supreme Court of India should, following broad consultations with representatives of the legal profession, formulate and adopt binding codes of judicial conduct in adherence with international law and standards.

    b. The Indian Parliament, following the advice and agreement of the Supreme Court of India and after broad consultations with representatives of the legal profession should establish a statutory mechanism for the redress of complaints against Judges of the High Courts and the Supreme Court based on international law and standards on judicial accountability. While ensuring that the executive and legislature have no role in the adjudication of such complaints, the redress mechanism and its outcomes must be amenable to judicial review.

3. **Post-retirement Employment:**

    The Supreme Court of India should, following broad consultations with the legal profession, consider formulating rules for the post-retirement employment or posting of Judges aimed at safeguarding against corruption or practices inconsistent with judicial independence, and to prevent the practice of employment or postings being determined solely by executive discretion.

4. **Judicial administration pertaining to listing and allocation of cases:**

    The Supreme Court of India should bring existing rules, policies and practices in line with international standards and best practices, particularly focusing on removing discretion and scope for arbitrariness in the listing and allocation of cases.

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January 2025

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